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2. Copyright (c) 1994 Arizona State Law Journal Arizona State Law Journal, Summer, 1994, 26 Ariz. St. L.J. 535, 16186 words, Justice Thurgood Marshall and the Integrative Ideal, Wendy Brown-Scott*

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ABYSS, Christina E. Wells*

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Victor Brudney *

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**********03860**********

LEVEL 1 - 1 OF 6 CASES

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,
Plaintiff-Appellee, v. RANDALL E. NICHOLS,
Defendant-Appellant.

No. 96-6472

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

137 F.3d 435; 1998 U.S. App. LEXIS 3161; 1998 FED App. 0070P
(6th Cir.)

December 1, 1997, Argued
February 27, 1998, Decided
February 27, 1998, Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied April 23, 1998, Reported at: 1998 U.S. App. LEXIS 9545.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 95-00349. Leon Jordan, District Judge.

DISPOSITION: Vacated and remanded.

CORE TERMS: regulation, establishment, adult, First Amendment, sexually-explicit, ordinance, theatre, secondary effects, content-neutral, neighborhood, sex, adult-oriented, preamble, sexually, booths, vagueness, selling, erotic, preliminary injunction, equal protection, genitals, video, erotic literature, motion pictures, content neutral, permanent injunction, sexual activity, paraphernalia, predominant, misdemeanor

COUNSEL: ARGUED: Steven A. Hart, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant.

Frierson M. Graves, Jr., BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, Tennessee, for Appellee.

ON BRIEF: Steven A. Hart, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, Michael J. Fahey, II, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant.

Frierson M. Graves, Jr., BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, Tennessee, for Appellee.

JUDGES: Before: MERRITT, BATCHELDER, and FARRIS, * Circuit Judges.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINIONBY: MERRITT

OPINION:

[*436] OPINION

137 F.3d 435, *436; 1998 U.S. App. LEXIS 3161, **1;
1998 FED App. 0070P (6th Cir.)

MERRITT, Circuit Judge. The defendant below, Randall E. Nichols, District Attorney for Knox County, Tennessee, [*437] appeals a permanent injunction entered by the district court against enforcement of statutory amendments to the Tennessee Adult-Oriented Establishment [**2] Act. The new statute limits the hours and days during which adult entertainment establishments can be open and requires such establishments to eliminate the closed booths in which patrons watch sexually-explicit videos or live entertainment.

The injunction was entered after plaintiff, Richland Bookmart, Inc., an adult bookstore in Knox County, Tennessee, challenged the constitutionality of the state law on the grounds that it violates the First Amendment and the Equal Protection Clause of the United States Constitution. The district court held that although the statute was content-neutral, the hours and days limitation violated the First Amendment because it was not narrowly tailored to address the stated goal of the statute -- the alleged deleterious "secondary effects" on neighborhoods and families caused by the presence of adult establishments. Having decided the case on the First Amendment ground, the district court did not reach plaintiff's equal protection argument. For the reasons stated below, the judgment of the district court is reversed and the case is remanded to the district court with instructions to vacate the permanent injunction.

I. The Statute in Question [**3]

On June 26, 1995, plaintiff, Richland Bookmart, Inc., a seller of sexually-explicit books, magazines and videos, filed a complaint for preliminary injunction, permanent injunction and declaratory judgment requesting that the district court declare Tennessee's Adult Oriented Establishment Act (1995 Tenn. Pub. Act 421, codified at Tenn. Code Ann. @@ 7-51-1401 et seq.) to be unconstitutional on its face or as applied to plaintiff. After a hearing on the preliminary injunction, the district court issued a preliminary injunction enjoining enforcement of the act. The injunction was made permanent on September 26, 1996, and defendant, District Attorney General for Knox County Randall Nichols, appealed to this Court.

Presumably in anticipation of expected First Amendment challenges, the act contains a lengthy preamble. Because the district court carefully summarized the long preamble, we will highlight only relevant portions here.

The preamble discusses the need to outlaw closed video booths because these booths are often used by patrons to stimulate themselves sexually, creating a public health problem. This provision does not apply to plaintiff. It does not have closed booths on its [**4] premises. Plaintiff sells adult books and magazines and sells and rents adult videos for off-premises viewing only. The preamble also lists detrimental health, safety and welfare problems caused by shops selling graphic sexual material -- the so-called "secondary effects," of the establishments on the communities that surround them -- and cites specific land-use studies done by other cities on the subject. The "secondary effects" identified include "increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases."

The preamble continues with a list of "unlawful and/or dangerous sexual activities" associated with adult-oriented establishments and ends with a list of citations to judicial decisions supporting such legislation.

The act defines "adult-oriented establishment" as "any commercial establishment . . . or portion thereof" selling as its "predominant stock or trade . . . sexually oriented material." n1

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n1 The complete definition is as follows:

any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults.

Chapter 421, Section 2(4).

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[**5]

"Sexually-oriented material" is defined as any publication "which depicts sexual activity . . . or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals [*438] in a discernibly turgid state, even if completely covered." n2

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n2 The complete definition of "sexually oriented material" is as follows:

any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

Chapter 421, Section 2(10).

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Section 3 prohibits adult-oriented establishments from opening before 8 a.m. or after midnight Monday through Saturday, and from being open at all on Sundays or the legal [**6] holidays listed in the Tennessee Code Annotated.

Section 4 prevents the use of private booths, stalls or partitioned rooms for sexual activity. Because plaintiff here does not have any private booths, the district court did not address this portion of the act.

Section 5 describes the criminal penalties under the act. A first offense for a violation is a Class B misdemeanor punishable by a fine of $ 500. Subsequent violations are Class A misdemeanors with no penalty specified in the statute. The Tennessee Code provides that Class A misdemeanors carry a penalty for a fine not to exceed $ 2500, imprisonment not to exceed 11 months and 29 days or both, unless the statute provides otherwise. Tenn. Code Ann. @ 40-35-111.

Section 6 states that live stage shows, adult cabaret and dinner theatre are excepted from the closing hours requirement. Section 7 allows local governments to impose other "lawful and reasonable" restrictions on adult-oriented establishments.

Plaintiff contends that the law violates both its First Amendment rights through the closing hours requirement and its equal protection rights by exempting certain other establishments that sell or trade in adult-oriented goods [**7] or services as at least part of their business.

The district court granted a preliminary injunction, later made permanent, against enforcement of the act, finding that the closing hours restrictions violate the First Amendment. The district court concluded that plaintiff was likely to succeed on the merits of its constitutional challenge because the act (1) goes beyond what is necessary to further the state's legitimate interest in regulating the secondary effects described in the act's preamble, (2) is overbroad and (3) is vague. The district court did not reach plaintiff's equal protection argument.

II. Analysis of Facial Validity of the Statute

This case arises from the tension between two competing interests: free speech protection of erotic literature and giving communities the power to preserve the "quality of life" of their neighborhoods and prevent or clean up "skid-rows." The tension arises because the First Amendment offers some protection for "soft porn," i.e., sexually-explicit, nonobscene material -- although "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled [**8] political debate. . . ." Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The Supreme Court most recently restated this view that "porn-type" speech is generally afforded less-than-full First Amendment protection in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (nude dancing).

The normal starting point for a discussion of the facial validity of statutory regulation of speech requires an analysis of the so-called "content-neutrality" of the regulation. Here, the bookstore contends that the act is a "content-based" regulation and therefore presumptively unconstitutional and subject to "strict scrutiny." The defendant prosecutor argues that the act is content-neutral and that the closing requirements are permissible "time, place and manner" regulation subject to the less exacting "intermediate scrutiny."

We agree with plaintiff that the legislation at issue here is obviously not content-neutral. The statute focuses on and regulates only [*439] "sexually-explicit" or porn-type speech. This is no more content neutral than a statute designed to regulate only political campaign advertising, newspaper [**9] want ads or computer graphics. The law singles out certain establishments for regulation based only on the type of literature they distribute. But see Barnes, 501 U.S. at 585 (Souter, J., concurring) and Mitchell v. Commission on Adult Entertain. Estabs., 10 F.3d 123 (3d Cir. 1993) (describing regulation of such sex literature as content neutral because it is designed to counter bad behavior in the neighborhood where it is sold).

The fact that such regulation is based on content does not necessarily mean that regulation of nonobscene, sexually-explicit speech is invalid. The law developed under the First Amendment offers such speech protection "of a wholly different, and lesser magnitude." Young v. American Mini Theatres, 427 U.S. at 70. In American Mini Theatres, the Court expressly ruled that the City of Detroit may legitimately use the content of adult motion pictures as the basis for treating them differently from other motion pictures. In order to prevent and clean up skid-rows, the ordinance confined theatres showing sex movies to a few areas of the city. A plurality of the Court upheld a content-based zoning ordinance restricting the location of adult [**10] movie theatres. The Court held that even though such sexually-explicit literature, unlike obscenity, is protected from total suppression, "the State may use the content of these materials as the basis for placing them in a different classification from other motion pictures." Id. at 70-71. Justice Steven's opinion is straightforward and clear. It says that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." Id. at 61. The Court concluded that the classification made by the City of Detroit was justified by the City's interest in preserving its neighborhoods from deterioration -- the now so-called "secondary effects" of erotic speech. The ordinance was upheld because it did not unduly suppress access to lawful speech. American Mini Theatres recognized that regulation based on content may be necessary to protect other legitimate interests. The Court did not try to maintain that the ordinance was, in fact, content- neutral; it stated only that it might be treated as if it were content-neutral [**11] because, like commercial speech, it is less than fully protected.

Justice Powell, concurring in American Mini Theatres, elaborated on the special circumstances presented when reviewing regulation of erotic or sexually-explicit speech:

Moreover, even if this were a case involving a special government response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

American Mini Theatres, 427 U.S. at 82 n.6 (cases omitted). Justice Powell specifically pointed out that sexually-explicit speech is different from other kinds of speech and, although protected to a certain degree, is offered less protection because other important social interests are at stake when sexually-explicit speech is at issue. Erotic or sexually-explicit literature is in a unique category, a category unto itself that the Supreme Court has decided may be regulated without subjecting the regulation to so-called "strict scrutiny" with its accompanying presumption [**12] of unconstitutionality.

Many have severely criticized the holding and rationale of American Mini Theatres, n3 [*440] including initially the four dissenters led by Justice Stewart, but a majority of the Court has adhered to its view allowing anti-skidrow, content-based regulation of establishments selling pornographic literature, movies, dancing and other hard-core erotic material. In a subsequent case, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), the Court upheld a content-based zoning ordinance enacted by the City of Renton, Washington, that prohibited adult motion picture

theatres from locating within 1,000 feet of family dwellings, churches, parks or schools.

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n3 Criticism of the analysis used in American Mini Theatres and later in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), is extensive in the legal literature. For a representative sample, see, e.g., Laurence Tribe, American Constitutional Law @ 12-3 (2d ed. 1988); Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 351-53 (1997); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 483-91 (1996); Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L. Q. 99, 125-28 & n.137 (1996); Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1265-67 (1995); Keith Werhan, The Liberalization of Freedom of Speech on a Conservative Court, 80 Iowa L. Rev. 51, 68-70 (1994); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 104, 114-17 (1987).

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[**13]

The intervening years had reduced the number of dissenters on the Court from four to two. Now it was only Justices Brennan and Marshall in dissent. Relying primarily on American Mini Theatres, the Court in Renton analyzed the ordinance as a form of time, place and manner regulation, although recognizing that a law that focuses on such films is obviously not content neutral. The Court acknowledged candidly that both ordinances treated adult theatres differently than other types of theatres, the traditional touchstone of content-based legislation.

The Court went on in City of Renton to explain that the ordinance did not contravene the fundamental principles that underlie concerns about content-based speech regulations because its stated purpose is to curb the "secondary effects" of adult establishments. Accordingly, the Court in City of Renton, like the Court in American Mini Theatres, decided that the zoning ordinances at issue could be reviewed under the standard applicable to content-neutral regulations, even though the ordinances were plainly content-based. The stated rationale is that a distinction may be drawn between adult theatres and other kinds of theatres. [**14] "without violating the government's paramount obligation of neutrality in its regulation of protected communication" because it is seeking to regulate the secondary effects of speech, not the speech itself. City of Renton, 475 U.S. at 49 (quoting American Mini Theatres, 427 U.S. 50 at 70).

Over the last decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both American Mini Theatres and City of Renton, that they are in fact content-based but are to be treated like content-neutral regulations for some purposes. See, e.g., North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 444 (7th Cir. 1996), cert. denied, 136 L. Ed. 2d 609, 117 S. Ct. 684 (1997); 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 995 (4th Cir. 1995); ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994); TK's Video, Inc. v. Denton County, Tx., 24 F.3d 705, 707 (5th Cir. 1994); Mitchell v. Commission on Adult Entertain. Estabs., 10 F.3d 123, 128-31 (3d Cir. 1993). Thus, in some cases, a kind [**15] of legal

fiction has been created that calls regulation of such literature "content neutral" when what is meant is only that the regulation is constitutionally valid.

Under present First Amendment principles governing regulation of sex literature, the real question is one of reasonableness. The appropriate inquiry is whether the Tennessee law is designed to serve a substantial government interest and allows for alternative avenues of communication. Does the law in question unduly restrict "sexually explicit" or "hard-core" erotic expression?

Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest." The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring [*441] such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store [**16] fronts, a blighted appearance and the lowering of the property values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

The legislation leaves open alternative avenues of communication. Access to adult establishments is not unduly restricted by the legislation. Adult establishments may still be open many hours during the week.

III. Overbreadth and Vagueness

Plaintiff contends, and the district court agreed, that the act is also unconstitutionally vague in that certain terms are not defined. We believe the terms are sufficiently defined so that a reasonable person would understand them.

Specifically, the district court found that the act's alleged vagueness may have a "chilling effect" on erotic literature that has "literary, artistic or political value." It also found that the word "paraphernalia" as used in the act might include places such as lingerie shops.

First, the plaintiff's establishment here clearly falls within the purview of the statute. In American [**17] Mini Theatres, the Court found that it was unnecessary to consider vagueness when an otherwise valid ordinance indisputably applies to the plaintiff -- when there is no vagueness as to him. 427 U.S. at 58-59. See also City of Renton, 475 U.S. at 55 n.4. Plaintiff is clearly an "adult-oriented establishment" as defined in the act. Any element of vagueness in the act does not affect this plaintiff.

Second, the law is not as vague as the bookstore contends. To be included within the purview of the act, an establishment must (1) have as its "principal or predominant stock or trade" sexually-oriented materials, devices or paraphernalia and (2) restrict admission to adults only. The terms used in the act are understandable common terms. Most buyers, sellers and judges know what such materials are and who are adults and who are children.

The Supreme Court examined overbreadth in detail in New York v. Ferber, 458 U.S. 747, 773-74, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982). In Ferber, the Court refused to find as unconstitutionally overbroad a state statute prohibiting persons from knowingly promoting sex by children under 16 by selling such material. The Court held that the [**18] mere possibility that some protected expression, some erotic literature, could arguably be subject to the statute was insufficient reason to find it unconstitutionally overbroad. The Court said that we should not assume that state courts would broaden the reach of a statute by giving it an "expansive construction." This is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly. Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 526 (Tenn. 1993).

* * *

Plaintiff also contends that the act violates its equal protection rights because the act exempts from regulation establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." The district court did not reach this issue and did not issue an injunction on this ground. We express no opinion on whether the act violates plaintiff's equal protection rights because this argument has not been fully developed or reviewed in the district court.

Accordingly, the preliminary injunction issued by the district court is vacated and set aside and the case remanded for further proceedings consistent with this opinion. [**19]

LEVEL 1 - 2 OF 6 CASES

RABBI ABRAHAM GROSSBAUM and LUBAVITCH of INDIANA, INC., Plaintiffs-Appellants, v. INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY and RONALD L. REINKING, in his Capacity as General Manager, Defendants-Appellees.

No. 95-3976

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

100 F.3d 1287; 1996 U.S. App. LEXIS 30216

September 6, 1996, Argued
November 20, 1996, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied May 19, 1997, Reported at: 1997 U.S. LEXIS 3126.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 94 C 1801. David F. Hamilton, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: motive, retaliation, display, viewpoint, regulation, nonpublic, lobby, religious, content-neutral, fora, menorah, public forum, preliminary injunction, first amendment, ban, constitutional rights, discriminate, applicable rule, free speech, subjective, injunction, neutrality, ordinance, banned, facade, discrimination claim, discretionary, retaliate, illicit, constitutional law

COUNSEL: For ABRAHAM GROSSBAUM, Rabbi, LUBAVITCH OF INDIANA, INCORPORATED, Plaintiffs - Appellants: Nathan Lewin, Niki Kuckes, David S. Cohen, MILLER, CASSIDY, LARROCA & LEWIN, Washington, DC USA. B. Keith Shake, HENDERSON, DAILY, WITHROW & DEVOE, Indianapolis, IN USA.

For INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY, RONALD L. REINKING, in his capacity as General Manager, Defendants - Appellees: Thomas J. Costakis, KRIEG, DEVAULT, ALEXANDER & CAPEHART, Indianapolis, IN USA.

JUDGES: Before CUMMINGS, BAUER, and KANNE, Circuit Judges.

OPINIONBY: KANNE

OPINION: [*1290] KANNE, Circuit Judge. This case presents the issue of what role a government body's motive plays in constitutional analysis when that body tries to regulate speech in a nonpublic forum. The Indianapolis-Marion County Building Authority amended its rules and regulations to prohibit private groups and individuals from exhibiting displays in the lobby of its City-County Building. This rule prevented the plaintiffs from displaying a menorah in the lobby as they had done for eight years [**2] between 1985 and 1992. The plaintiffs sought a preliminary injunction against the new rule so they could again display their menorah. The plaintiffs contended that even though the rule is viewpoint-neutral, its adoption was motivated by an unconstitutional desire to retaliate against the plaintiffs for previous litigation and to

discriminate against their religious viewpoint. The District Court denied the motion for the preliminary injunction. Because we hold that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum, we affirm.

I. HISTORY

This is the second time that this case has come before us. See Grossbaum v. Indianapolis-Marion County Building Authority, 63 F.3d 581 (7th Cir. 1995) (Grossbaum I). In the previous appeal, Rabbi Grossbaum and Lubavitch of Indiana, Inc. n1 ("Lubavitch") successfully challenged a policy of the Indianapolis-Marion County Building Authority ("Building Authority") that prohibited religious displays and symbols (such as the plaintiffs' menorah) in the lobby of the City-County Building n2 in Indianapolis. We held that "the prohibition of the menorah's message because of [**3] its religious perspective was unconstitutional under the First Amendment's Free Speech Clause." Grossbaum I, 63 F.3d at 592. This second appeal now challenges a new Building Authority policy that prohibits all private displays, religious or otherwise.

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n1 Lubavitch is "an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 587 n.35, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (citations omitted).

n2 The City-County Building in downtown Indianapolis is the seat of government for the City of Indianapolis and the County of Marion, Indiana. The defendant Building Authority is a municipal corporation that administers the building.

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From 1985 to 1992, Rabbi Grossbaum displayed a five foot high, wooden menorah each year in the City-County Building lobby. In 1993, however, the Indiana Civil Liberties Union [**4] ("ICLU") and the Jewish Community Relations Council ("JCRC") both asked the Building Authority to change its policy. The ICLU argued that religious displays in a nonpublic forum violated the Establishment Clause and that the Building Authority should therefore designate the lobby as a "public forum" to make it clear that all groups would have access to the lobby. The JCRC, meanwhile, wrote a letter to the Building Authority asking that all religious displays be banned so that groups such as the Ku Klux Klan could not use the menorah's presence as an argument for letting in their religious displays.

Expressing concern about losing control over the lobby if it became a public forum, the Building Authority Board of Directors in late 1993 banned all religious displays, thus simultaneously satisfying the JCRC and mooting the ICLU's Establishment Clause complaint. Lubavitch, however, sought a preliminary injunction against the policy, alleging that it was an unconstitutional exclusion of speech protected by the First Amendment. As mentioned above, this court agreed and granted Lubavitch injunctive relief. 63 F.3d at 582.

After our August 1995 decision, however, the Building Authority Board [**5] again modified [*1291] its lobby display policy. At its October 2, 1995 meeting, the Board amended Rule 13 of its "Rules and Regulations Governing The CityCounty Building and Grounds" to read, in part:

No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

On November 29, 1995, Lubavitch amended its original complaint and again sought a preliminary injunction to allow the display of its menorah. Although Rule 13 is content-neutral, Lubavitch claimed that the Board enacted the new rule with an unconstitutional intent. More specifically, Lubavitch alleged two counts under 42 U.S.C. @ 1983: 1) that the Board intended to retaliate against Lubavitch for exercising its right to seek judicial relief and its right to speak in the City-County Building lobby, and 2) that the Board intended to perpetuate the viewpoint discrimination that the Board had earlier attempted when it banned all religious [**6] displays in the lobby.

Lubavitch offered three general categories of evidence to support its claims of unconstitutional motive. First, Lubavitch claimed that the Building Authority enacted Rule 13 in a surreptitious manner. Rule 13 was adopted less than two months after this court's decision in favor of Lubavitch, and the only public notice that the Board might change Rule 13 at its October 1995 meeting was a vague agenda item referring to "Policies on Use of Common Areas." The Building Authority responded, however, that it had at all times followed Indiana's Open Door Law procedures. Second, Lubavitch disputed the Board's justification for the new Rule 13. According to the Board's minutes, the Board banned private displays to assure the free flow of pedestrian traffic in the lobby. The minutes also state that lobby congestion was a particular concern of the Board after it had approved new security measures (such as metal detectors in the lobby) in June 1995. Lubavitch, however, argued that there was no history of displays disrupting lobby traffic that would justify banning all private displays. Third, Lubavitch cited deposition testimony by Board members that it was the Board's intent [**7] to ban religious displays. The Building Authority countered that the testimony was taken out of context in that the admission of a desire to ban religious displays was merely a logical implication of the Board's broader desire to ban all private displays.

The District Court denied Lubavitch's motion for a preliminary injunction, finding that the plaintiffs had not shown a reasonable likelihood of prevailing on either their retaliation or their viewpoint discrimination claim. 909 F. Supp. 1187, 1211 (S.D. Ind. 1995). The court held that although the new Rule 13 was a response to Lubavitch's prior litigation, the rule "remedied the constitutional violation and was not motivated by any desire to punish plaintiffs or to get even with them for filing suit." Id. Similarly, the court found that the Board's decision was not "a mask for a desire to prohibit the expression of these plaintiffs' or others' religious beliefs." Id. Because the balance of harms to the parties was not lopsided, the District Court therefore denied the preliminary injunction. Lubavitch appealed pursuant to 28 U.S.C. @ 1292(a)(1), which gives us jurisdiction to review interlocutory orders that deny injunctive [**8] relief.

II. ANALYSIS

A. Standard of Review

In considering a motion for a preliminary injunction, a district court must first determine whether the moving party has demonstrated 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties. Erickson [*1292] v. Trinity Theatre, Inc., 13 F.3d 1061, 1067 (7th Cir. 1994).

When we review a trial court's grant or denial of a preliminary injunction, we subject findings of fact to clear error review, Fed. R. Civ. P. 52(a); we review a trial court's discretionary balancing of factors under an abuse of discretion standard, Gould v. Lambert Excavating, Inc., 870 F.2d 1214, 1217 (7th Cir. 1989); and we review a trial court's legal conclusions de novo, West Allis Memorial Hosp., Inc. v. Bowen, 852 F.2d 251 (7th Cir. 1988).

B. [**9] The Role of Motive in Constitutional Doctrine

Before addressing Lubavitch's specific claims of retaliation and viewpoint discrimination, a few words are appropriate to consider exactly when and why the motives of government actors are relevant in constitutional analysis. Both parties in this case seem to assume that if the Building Authority Board was motivated by an intent to retaliate against Lubavitch or to discriminate against religious viewpoints then ipso facto the Board violated the Constitution. This leap from nefarious motive to constitutional violation, however, is by no means an automatic one under constitutional case law.

Motive is, of course, relevant to a number of constitutional claims. In Equal Protection Clause analysis, for example, courts often must inquire into the motives of legislators or other government actors. n3 See, e.g., Miller v. Johnson, 132 L. Ed. 2d 762, 115 S. Ct. 2475, 2488 (1995) (voting district violates Constitution if race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); Batson v. Kentucky, 476 U.S. 79, 93, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) (prosecutor's peremptory challenges are unconstitutional [**10] if based solely on purposeful racial discrimination). Similarly, cases under the Establishment Clause or the Bill of Attainder Clauses n4 may require courts to query the subjective intentions of legislators for possible illicit motives. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (legislature's "actual purpose" to promote religion invalidates statute); United States v. Lovett, 328 U.S. 303, 313-14, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

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n3 Although courts are often loose in their phraseology, the inquiry that courts occasionally make into the subjective "intent," "motive," or "actual purpose" of government actors should not be confused with the inquiry courts always must make in Equal Protection Clause cases to determine whether a

classification advances any legitimate government "purpose," "interest," or "end". The former inquiry requires courts to examine whether the actual thoughts of government officials were constitutionally pure. In Justice Cardozo's words, it requires judges to "psychoanalyze" legislators. See United States v. Constantine, 296 U.S. 287, 299, 80 L. Ed. 233, 56 S. Ct. 223 (1935) (Cardozo, J., dissenting). The latter inquiry, however, requires courts to consider only whether "any state of facts reasonably may be conceived to justify" the classification. McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); see also Alexander M. Bickel, The Least Dangerous Branch 209 (1962) ("[A] determination of 'purpose' . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view.").

The subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to, in a Free Exercise Clause case, as the "object" of a law. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). The Court there determined that three ordinances impermissibly "had as their object the suppression of religion." Id. at 2231. The Court made this determination by analyzing both the text and the effect in "real operation" of the ordinances. Id. at 2226-31. The Court did not, however, analyze the motive behind the ordinances. Justice Kennedy's investigation into motive (in Part IIA-2 of his opinion) was joined by only Justice Stevens. [**11]

n4 Article I, @ 9, cl. 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, @ 10, cl. 1 provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

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The relevance of motive in these instances of constitutional adjudication does not, however, allow the inductive conclusion that a [*1293] universal, all-purpose cause of action exists whenever a plaintiff can allege an unconstitutional motive.

In a Free Speech Clause case, for example, the Supreme Court went so far as to say that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. 367, 383, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although that statement may be hyperbole, one constitutional commentator has concluded that, rather than focusing on motive, "most descriptive analyses of First Amendment law, as well as most normative discussions . . . have considered the permissibility of governmental [**12] regulation of speech by focusing on the effects of a given regulation." Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 413 (1996); cf. McCray v. United States, 195 U.S. 27, 56, 49 L. Ed. 78, 24 S. Ct. 769 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

Even in the Equal Protection Clause context, the Supreme Court has occasionally been reluctant to question legislative and administrative motive. In Palmer v. Thompson, 403 U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971), the City of Jackson, Mississippi had decided to close its public swimming pools rather than desegregate them under court order. The Supreme Court, faced with facts obviously analogous to the case we now consider, explicitly declined to inquire into the city council's motives for closing the pools. Id. at 224-26. The Court upheld the closings because the petitioners had shown "no state action affecting blacks differently from whites." Id. at 225.

A number of factors explain this [**13] reluctance to probe the motives of legislators and administrators. For starters, the text of the Constitution prohibits many government actions but makes no mention of governmental mentes reae (i.e., guilty minds). The First Amendment, for example, forbids Congress and (through the Fourteenth Amendment's Due Process Clause) the States from making laws "abridging the freedom of speech"--a far different proposition than prohibiting the intent to abridge such freedom. "We are governed by laws, not by the intentions of legislators." Conroy v. Aniskoff, 507 U.S. 511, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring in judgment). Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution. See Church of the Lukumi Babalu Aye, 113 S. Ct. at 2240 (Scalia, J., concurring in part and concurring in judgment); see also Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1, 23.

Beyond these theoretical objections [**14] to investigating motive, practical considerations also suggest caution. Government actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action. Doubting the propriety of judicial searches for corrupt motives, Chief Justice Marshall thus asked:

> Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130, 3 L. Ed. 162 (1810). Moreover, once a court finds an illicit motive, may the legislature or administrative body ever take the same action again without the imputation of improper intent? The Court in O'Brien declined to strike down a law allegedly tainted by improper motive in part because Congress could then reenact the law "in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 384; see [*1294] generally John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. [**15] 1205, 1212-17 (1970).

In short, the relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

C. Lubavitch's Retaliation Claim

Turning now to the plaintiffs' specific claims, Lubavitch first alleges that the Building Authority's adoption of Rule 13 was in retaliation for plaintiffs' exercise of their free speech rights and for their exercise of their right to petition the courts for redress of grievances. Lubavitch undoubtedly has such rights. n5 Whether Lubavitch also has a legitimate cause of action for retaliation, however, is another matter.

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n5 Lubavitch presumably is referring to its rights under the Free Speech Clause and the Petition Clause. The Petition Clause of the First Amendment prohibits Congress from making any law "abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The Supreme Court has held that this right to petition includes the right of access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). The Court has also held that both the Free Speech Clause and the Petition Clause apply to the States through the Fourteenth Amendment's Due Process Clause. See Gitlow v. New York, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925); Edwards v. South Carolina, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963).

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The plaintiffs cite numerous cases for the general proposition that "an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987). Indeed, there seems to have been an assumption in this litigation that Lubavitch would win if it could show that the Building Authority enacted Rule 13 out of a desire to punish Lubavitch for the exercise of its constitutional rights.

Claims of retaliation admittedly almost always turn on the issue of motive. See, e.g., Perry v. Sindermann, 408 U.S. 593, 598, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (holding that a public employee must show "the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). An examination of the cases cited in the briefs, however, indicates that both parties fundamentally misconceive the nature of retaliation claims. The broad, sweeping language cited by the parties is belied by the facts of the cases themselves. Indeed, to allow a retaliation cause of action against the Building Authority in this case [**17] would be a huge and unwarranted extension of established retaliation doctrine.

Of the 21 cases cited in the briefs and referenced in the District Court's opinion regarding the proper standard for retaliation claims, 16 were claims brought by either public employees or prisoners. n6 Those numbers alone should have suggested caution when considering Lubavitch's atypical retaliation claim. More tellingly, however, all of the cases cited involved challenges to discretionary government actions taken vis-a-vis individual citizens. None of these cases involved [*1295] a challenge to the mere adoption of a rule, let alone a prospective and generally applicable rule like the Building Authority's Rule 13.

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n6 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); Board of Education v. Pico, 457 U.S. 853, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469 (7th Cir. 1995); Hale v. Townley, 19 F.3d 1068 (5th Cir. 1994); Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994); Cromley v. Board of Education, 17 F.3d 1059 (7th Cir. 1994); Gooden v. Neal, 17 F.3d 925 (7th Cir. 1994); Brookins v. Kolb, 990 F.2d 308 (7th Cir. 1993); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307 (7th Cir. 1989); Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) (en banc); Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988); Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987); Button v. Harden, 814 F.2d 382 (7th Cir. 1987); Harvey v. Merit Systems Protection Bd., 256 U.S. App. D.C. 6, 802 F.2d 537 (D.C. Cir. 1986); Perry v. Larson, 794 F.2d 279 (7th Cir. 1986); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978); Burton v. Kuchel, 865 F. Supp. 456 (N.D. Ill. 1994).

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Indeed, retaliation case law demonstrates that retaliation causes of action are challenges to the application of governmental rules, not to the rules themselves. Consider a typical retaliation case. A public employee will claim that she was denied a promotion because she has exercised some right, say affiliating with a certain political party. The government employer typically responds that the employee failed to get the promotion not because of her politics but because of some independent, neutral rule (e.g., she was less qualified than other applicants). The employee never disputes that the independent reason is a valid criterion. Rather, the employee will allege only that the rule is being applied arbitrarily or unequally to her.

Retaliation claims are undoubtedly vital to constitutional law. No matter how constitutionally sound a given rule may be, the repeated misapplication or selective application of the rule could create an entirely unconstitutional policy. An official hiring policy that disregards political affiliation, for example, could be no different in its objective, discernible effect than a policy of hiring only Democrats if the official policy is misapplied or ignored.

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Nonetheless, courts will not sustain a retaliation claim where a plaintiff challenges only the enactment of a prospective, generally applicable rule. Executive and legislative branches of government must not be paralyzed by the prospect of a retaliation claim (and the attendant factbased motive inquiry n7) whenever they make new policy that is arguably in response to someone's speech or lawsuit. Suppose, for example, that a group of drug addicts successfully sues to get disability benefits for their addiction and Congress subsequently amends the law to prohibit benefits to drug addicts. No one would reasonably suggest that Congress's motives would then be subject to a retaliation inquiry just because it acted in response to the addicts' success in the courts.

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n7 Pretext and motive are almost automatically relevant in retaliation cases because courts cannot easily determine whether the government is applying its

rules equally and fairly. Because cases come before courts one at a time, the details of any particular case may obscure a covert pattern of discrimination against those exercising certain constitutional rights. The only indicator a judge may have of what policy was really being followed may be the motives of the government actors. Motive is relevant not because government officials' thoughts have any constitutionally cognizable psychokinetic effect on constitutional rights, but rather because those thoughts are the best indicator to the courts of what policy the government is actually putting into effect. Cf. Kagan, supra, at 457 (discussing how courts cannot easily determine, in the context of administrative action, when a content-based decision has occurred).

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Plaintiffs can, of course, attack the substance of a rule as being facially unconstitutional. See, e.g., Saia v. New York, 334 U.S. 558, 559-60, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (striking down ordinance giving unfettered discretion to local officials regarding speaker permits); United Pub. Workers v. Mitchell, 330 U.S. 75, 100, 91 L. Ed. 754, 67 S. Ct. 556 (1947) (Congress may not "enact a regulation providing that no Republican . . . shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work"). And government officials cannot escape a retaliation claim simply by dressing up individualized government action to look like a general rule. A policy that prohibited all lobby displays by groups that had put up displays during the previous December, for example, would be neither prospective nor generally applicable. Plaintiffs may not, however, use a retaliation claim to challenge a truly prospective and generally applicable rule that is even-handedly enforced.

In short, retaliation claims protect constitutional rights only against their unequal infringement. We recognized as much in Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988), where a teacher brought both [**21] retaliation and equal protection claims after he was dismissed, allegedly for statements he had made to a local newspaper. After disposing of the retaliation claim, we said his equal protection claim alleged "only that he was treated differently because he exercised his right to free speech" and thus was "a mere rewording of plaintiff's First Amendment-retaliation claim." [*1296] Id. at 1391-92; see also Thompson v. City of Starkville, Miss., 901 F.2d 456, 468 (5th Cir. 1990) (dismissing plaintiff's equal protection claim in retaliation case because it "amounted to no more than a restatement of his first amendment claim"). In other words, retaliation doctrine protects citizens against those individualized, discretionary government actions where the government's coercive power is greatest, not against government rules that affect both majority and minority alike. n8

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n8 We do not imply, however, that retaliation claims arise under the Equal Protection Clause. That clause does not establish a general right to be free from retaliation. Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir. 1995); see also Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 43-45 (1st Cir. 1992). We suggest only that the retaliation protection provided by other clauses of the Constitution is limited to claims against the unequal application of discretionary government power.

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Returning to the specifics of this case, Rule 13 is unequivocally a prospective and generally applicable rule because it bans all private displays henceforth. Furthermore, no one has even hinted that the rule has been or is being applied unequally. Lubavitch therefore has not stated facts sufficient for a retaliation claim. To hold otherwise would be a significant expansion of retaliation doctrine and would encourage only litigiousness and governmental paralysis.

D. Lubavitch's Viewpoint Discrimination Claim

Although its retaliation claim can be dismissed with relative ease, Lubavitch presents a more colorable viewpoint discrimination claim. Here Lubavitch alleges that, regardless of whether the Building Authority wanted to retaliate because of Lubavitch's litigation success, the Building Authority's overarching intent to discriminate against the menorah display (and against religious displays generally) makes Rule 13 an unconstitutional viewpointbased regulation of speech. n9

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n9 Although Lubavitch's viewpoint discrimination claim clearly derives from a long line of Free Speech Clause case law, Lubavitch argues on appeal that amended Rule 13 also violates the Establishment Clause. Lubavitch's general invocation of the First Amendment in its complaint, however, is far too broad to preserve an Establishment Clause claim raised for the first time on appeal. Like the Fourteenth Amendment, the First Amendment is "a vast umbrella, and to preserve a claim under it for consideration by an appellate court you must tell the court just what spot of ground beneath the umbrella you're standing on." Yatvin v. Madison Metro. Sch. Dist., 840 F.2d 412, 420 (7th Cir. 1988).

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Because the City-County Building lobby is government property, the constitutionality of a regulation of speech on that property hinges on what has been called "forum analysis." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Although "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," id. at 799-800, any regulation of speech on government property must still withstand some constitutional scrutiny.

The exact constitutional standard depends on whether the government is trying to regulate a "public forum" or a "nonpublic forum." Property can be designated as a public forum either by tradition or by law. Capitol Square Review and Advisory Bd. v. Pinette, 132 L. Ed. 2d 650, 115 S. Ct. 2440, 2446 (1995). Traditional public fora are properties like streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (quoting [**24] Hague v. Committee for Industrial Organization, 307 U.S.

496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (opinion of Roberts, J.)). Legally created public fora are fora such as school board meetings and municipal theaters where the government has intentionally--not by inaction or by permitting limited discourse--opened a nontraditional forum for public discourse. See Cornelius, 473 U.S. at 802; Perry, 460 U.S. at 45-46. [*1297] Any remaining government property is considered a nonpublic forum. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

Given their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions. Any speech regulation in a public forum must be either 1) a reasonable, content-neutral time, place, and manner restriction, or 2) narrowly drawn to advance a compelling state interest. Capitol Square, 115 S. Ct. at 2446. As Justice Brennan explained in his Perry dissent, content-neutrality is a particularly strong constitutional standard that "prohibits the government from choosing the subjects that are appropriate for public discussion." Perry, 460 U.S. at 59 (Brennan, J., dissenting). [**25] In other words, content-neutrality not only forbids discrimination against particular viewpoints on a subject (what Justice Brennan called "censorship in its purest form," id. at 62), but also prevents the government from even limiting discussion in public fora to specific subjects. A content-neutral regulation is thus both viewpoint-neutral and subject-neutral. See Rosenberger v. Rector and Visitors of the Univ. of Va., 132 L. Ed. 2d 700, 115 S. Ct. 2510, 2517 (1995) ("Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.").

The constitutional standard governing speech regulations in nonpublic fora is less certain. The Supreme Court has elaborated on the standard in a number of cases, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be "reasonable in light of the purposes served by the forum." Rosenberger, 115 S. Ct. at 2517; Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993); Cornelius, 473 U.S. at 806; Perry, 460 U.S. at 49; see also Postal Service [**26] v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981). The cases have been less definitive, however, regarding the neutrality standard that a nonpublic forum speech regulation must meet. In Postal Service v. Council of Greenburgh Civic Ass'ns, the Court said that such speech restrictions must be content-neutral. Id. In Perry and Cornelius, however, the Court shifted its focus to viewpoint discrimination and particularly to the intent to discriminate against specific viewpoints. The Court stated that a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view," Perry, 460 U.S. at 46, and similarly that a regulation must not be "in reality a facade for viewpoint-based discrimination," Cornelius, 473 U.S. at 811. In its most recent cases, meanwhile, the Court has said that nonpublic forum regulations must be viewpoint neutral, making no mention of impermissible intent. See Rosenberger, 115 S. Ct. at 2517; Lamb's Chapel, 113 S. Ct. at 2147.

We need not decide whether the City-County Building lobby is a public forum because Lubavitch has conceded for the purposes of its preliminary [**27] injunction motion that the lobby is a nonpublic forum. We must determine, however, the appropriate standard under which to review Rule 13. The Court has clearly abandoned the content neutrality standard, but the relevance of motive

in the Court's opinions has varied. We must therefore determine whether the subjective language in Perry and Cornelius (suggesting that the mere intent to discriminate against a viewpoint is sufficient for a constitutional violation) survives the more recent cases that suggest a more objective measure of viewpoint-neutrality.

Whatever the Court's language in recent cases, the Court's actions are both more telling and more binding than any mere dicta. And the motive language in earlier cases cannot be dismissed as mere dicta because the Court in Cornelius remanded the case to determine whether the speech restriction at issue was "impermissibly motivated by a desire to suppress a particular point of view." [*1298] 473 U.S. at 812-13. Nonetheless, we view the present case as distinguishable from these prior precedents because the Court never considered a content-neutral speech restriction like Rule 13. Rather, the Court's concern about motivation arose [**28] only in cases where the Court was considering speech restrictions that explicitly discriminated on the basis of content.

Motive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one. Because subject matter discrimination is clearly constitutional in nonpublic fora, see Perry, 460 U.S. at 49, classifying a particular viewpoint as a subject rather than as a viewpoint on a subject will justify discrimination against the viewpoint. This inherent manipulability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination. See Airline Pilots Ass'n v. Department of Aviation, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (warning courts against retreating to an exaggerated level of generality when examining content-based regulations). Courts thus have struggled, for example, with the issue of whether religious discussion should be categorized as a subject (and therefore excludable from a nonpublic forum) or as a viewpoint (and therefore constitutionally protected). See Rosenberger, 115 S. Ct. at 2517-18; Grossbaum I, 63 F.3d at 589-92. The [**29] Supreme Court faced a similar issue in Cornelius where it was understandably dubious of the argument that excluding all advocacy groups, regardless of political orientation, from a government charity drive was just subject matter discrimination rather than viewpoint discrimination. 473 U.S. at 811-12. Because the government was distinguishing among groups based on the content of their messages (either advocacy or nonadvocacy), the Court remanded the case to see whether the government was really targeting certain viewpoints.

Where, however, the government enacts a content-neutral speech regulation for a nonpublic forum, there is no concern that the regulation is "in reality a facade for viewpointbased discrimination," Cornelius, 473 U.S. at 811. Whatever the intent of the government actors, all viewpoints will be treated equally because the regulation makes no distinctions based on the communicative nature or impact of the speech. A facade for viewpoint discrimination, in short, requires discrimination behind the facade (i.e., some viewpoint must be disadvantaged relative to other viewpoints). Courts do have a hard call to make when they review content-based speech regulations [**30] because the government could be shutting out some viewpoints by labelling them as subjects. Motive may thus be a vital piece of evidence that courts must use to judge the viewpoint-neutrality of the regulation. When the government restricts speech in a content-neutral fashion, however, all viewpoints--from the Boy Scouts to the Hare Krishnas--receive the exact same treatment. n10

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n10 It should be noted that content-neutrality requires not only facial neutrality but also some semblance of general applicability. Cf. Church of the Lukumi Babalu Aye, 113 S. Ct. at 2226-33 (discussing neutrality and general applicability as the touchstones of Free Exercise Clause analysis); id. at 2239 (Scalia, J., concurring in part and concurring in the judgment); Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-81, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays. The lack of general applicability is obvious not from the government's motives but from the narrowness of the regulation's design and its hugely disproportionate effect on Jewish speech. Cf. Tribe, supra, at 34.

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Indeed, the Supreme Court suggested in Capitol Square that content-neutral regulations are free from motive inquiries even in public forum cases. The Court there considered the denial of a permit to the Ku Klux Klan for the erection of a Latin cross in a public forum, even after the government had granted permission for a Christmas tree and a menorah to be displayed. Eight members of the Court joined behind the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." Capitol Square, [*1299] 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in the judgment); see also id. at 2446; id. at 2467-68 (Stevens, J., dissenting). This proposed course of action would seem impossible, however, if Ohio's undisputed desire to keep the Klan off of government property would be sufficient to establish viewpoint discrimination. And if eight justices thought Ohio was free, even after it had discriminated against the Klan, to ban all private displays in a public forum, then the Building Authority a fortiori should have the same freedom to prohibit all private displays in its nonpublic forum. n11

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n11 Our holding today is expressly limited to speech regulations in nonpublic fora. We express no opinion on the harder issue of whether motive is relevant in public forum cases. The nonpublic forum case is easier because of the stronger government interest in controlling property not dedicated to public discourse, see Perry, 460 U.S. at 49, and because of the lesser role that nonpublic fora generally play in the marketplace of ideas, see Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 52 (1986).

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In sum, content-neutral speech regulations in nonpublic fora pass constitutional muster regardless of motive for the same reason that retaliation claims are inoperative against generally applicable rules. When a government body acts at a sufficiently high level of generality, there is no need for courts to search the minds of government actors for invidious motives that might indicate unconstitutional discriminatory effect. And it is this unconstitutional effect that ultimately matters. "[A] facially neutral government action that

does not in fact . . . violate anyone's constitutional rights or any constitutional principle . . . should not be rendered unconstitutional, or even suspect, just by virtue of the factors considered by, or the attitudes or intentions held by, the public officials responsible for that action . . . ." Tribe, supra, at 28-29; cf. Kagan, supra, at 505-17.

Moreover, we are mindful of Judge Easterbrook's observation that real world actors such as the Building Authority need ex ante guidance from our decisions, not just ex post judicial critiques:

People are entitled to know the legal rules before they act, and only the most compelling reason [**33] should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). The past year of litigation, the more than 900 pages of depositions fishing for an inculpatory admission by the Building Authority, and the thousands of taxpayer dollars spent on legal expenses for this case only underscore the point. This motive game is not worth the candle.

The only possible issue remaining is whether Rule 13 is reasonable in light of the purposes served by the CityCounty Building lobby. Although Lubavitch did not explicitly challenge Rule 13 on reasonableness grounds separate from its viewpoint discrimination claim, Lubavitch clearly did argue that the unreasonableness of Rule 13 was evidence that the Building [**34] Authority's motives were pretextual. Assuming for the sake of argument that this was sufficient to raise the reasonableness issue, we are confident that the District Court did not abuse its discretion when it denied Lubavitch's motion for a preliminary injunction. "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808. The District Court found a number of reasonable justifications for the new Rule 13, 909 F. Supp. at 1205, 1207, 1209-10, and all are well within the bounds of what rational basis scrutiny permits.

In closing, nothing in this opinion should be construed as undermining Lubavitch's hardfought success in its previous appeal to this court. Lubavitch clearly struck a blow for the freedom of speech when it challenged [*1300] the Building Authority's earlier policy that discriminated against religious displays. Lubavitch's prior victory against the Building Authority does not, however, give Lubavitch immunity against all subsequent Building Authority actions that, although nondiscriminatory, happen to be disadvantageous to Lubavitch.

The decision [**35] of the District Court to deny preliminary injunctive relief is AFFIRMED.

LEVEL 1 - 3 OF 6 CASES

LUKE RECORDS, INC., a Florida corporation formerly known as Skyywalker Records, Inc., et al., Plaintiffs-Appellants, v. Nick NAVARRO, Sheriff, Broward County, Florida, Defendant-Appellee.

No. 90-5508

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

960 F.2d 134; 1992 U.S. App. LEXIS 9592; 20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

May 7, 1992, Decided

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Florida. DISTRICT BANKRUPTCY COURT DOCKET NO. 90-6220-Civ-JAG. D/C Judge GONZALEZ

DISPOSITION: REVERSED.

CORE TERMS: obscene, music, artistic, prurient interest, rap, recording, obscenity, musical, undersigned, First Amendment, lyrics, independent review, conventions, literary, prong, declaratory judgment, average person, patently offensive, sexual conduct, expertise, finder, expert testimony, film, relevant community, community standard, federal district, burden of proof, tape recording, fact finder, preponderance

COUNSEL: ATTORNEYS FOR APPELLANTS: B ruce Rogow, 2441 S.W. 28th Ave., Ft. Lauderdale, FL. 33312, (305) 524-2465. Allen Jacobi, 1313 N.E. 125th Street, North Miami, FL. 33161, (305) 893-4135.

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For Amicus, Recording Industry Assoc. of America, Inc.: Kevin T. Baine, WILLIAMS & CONNOLLY, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000. Victoria L. Radd, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000. Elena Kagan, 839-17th Street, N.W., Washington, DC 20006; (202) 331-5000.

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On behalf of: THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., 225 N.W. 34th Street, Suite 208, Miami, FL 33137; (305) 576-2336.

For Amicus - Robert T. Perry: Robert T. Perry, PRO SE, 509 12th Street, Apt. 2C, Brooklyn, NY 11215 (718) 768-7578.

960 F.2d 134, *; 1992 U.S. App. LEXIS 9592, **1;
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FOR National Association of Recording: Charles B. Ruttenberg, 1050 Connecticut Ave., N.W. Washington, D.C. 20036, (202) 857-6082. John T. Mitchell, 1050 Connecticut Ave., N.W. Washington, D.C. 20036, (202) 857-6082.

ATTORNEY FOR APPELLEE: John Jolly, 1322 S.E. Third Ave., Ft. Lauderdale, FL. 33316, (305) 462-3200.

JUDGES: Before ANDERSON, Circuit Judge, RONEY and LIVELY, * Senior Circuit Judges.

* Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

OPINIONBY: PER CURIAM

OPINION: [*135] PER CURIAM:

In this appeal, appellants Luke Records, Inc., Luther Campbell, Mark Ross, David Hobbs, and Charles Wongwon seek reversal of the district court's declaratory judgment that the musical recording "As Nasty As They Wanna Be" is obscene under Fla.Stat. @ 847.011 and the United States Constitution, contending that the district court misapplied the test for determining obscenity. We reverse.

Appellants Luther Campbell, David Hobbs, Mark Ross, and Charles Wongwon comprise the musical group "2 Live Crew," which recorded "As Nasty As They Wanna Be." In response to actions taken by the Broward County, Florida Sheriff's Office to discourage record stores from selling "As Nasty As They Wanna Be," appellants filed this action in federal district court to enjoin the Sheriff from interfering further with the sale of the recording. The district court granted the injunction, finding that the actions of the Sheriff's [**2] office were an unconstitutional prior restraint on free speech. The Sheriff does not appeal this determination.

In addition to injunctive relief, however, appellants sought a declaratory judgment pursuant to 28 U.S.C.A. @ 2201 that the recording was not obscene. The district court found that "As Nasty As They Wanna Be" is obscene under Miller v. California. n1

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n1 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

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This case is apparently the first time that a court of appeals has been asked to apply the Miller test to a musical composition, which contains both instrumental music and lyrics. n2 Although we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene, that issue is not presented in this case. The Sheriff's contention that the work is not protected by the First Amendment is based on the lyrics, not the music. The Sheriff's brief denies any intention to put rap music to the [**3] test, but states "it is [*136] abundantly

obvious that it is only the 'lyrical' content which makes "As Nasty As They Wanna Be" obscene." Assuming that music is not simply a sham attempt to protect obscene material, the Miller test should be applied to the lyrics and the music of "As Nasty As They Wanna Be" as a whole. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S. Ct. at 2615. This test is conjunctive. Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.1980). A work cannot be held obscene unless each element of the test has been evaluated independently and all three have been met. Id.

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n2 In a pre-Miller case, United States v. Davis, 353 F.2d 614 (2d Cir.1965), cert. denied, 384 U.S. 953, 86 S. Ct. 1567, 16 L. Ed. 2d 549 (1966), that court affirmed the conviction of a defendant for mailing obscene materials, determining that two phonograph records and labels were obscene. Justice Stewart, dissenting from the denial of certiorari, stated that one of the records "consisted almost entirely of the sounds of percussion instruments" and the other was a "transcription of passages from . . . a book of poems." 384 U.S. at 953, 86 S. Ct. at 1567.

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[**4]

Appellants contend that because the central issue in this case is whether "As Nasty As They Wanna Be" meets the definition of obscenity contained in a Florida criminal statute, the thrust of this case is criminal and the Sheriff should be required to prove the work's obscenity beyond a reasonable doubt. In the alternative, appellants assert that at minimum, the importance of the First Amendment requires that the burden of proof in the district court should have been by "clear and convincing evidence," rather than by "a preponderance of the evidence." Assuming, arguendo, that the proper standard is the preponderance of the evidence, we conclude that the Sheriff has failed to carry his burden of proof that the material is obscene by the Miller standards under that less stringent standard. Thus, to reverse the declaratory judgment that the work is obscene, we need not decide which of the standards applies.

There are two problems with this case which make it unusually difficult to review. First, the Sheriff put in no evidence but the tape recording itself. The only evidence concerning the three-part Miller test was put in evidence by the plaintiffs. Second, the case was tried [**5] by a judge without a jury, and he relied on his own expertise as to the prurient interest community standard and artistic value prongs of the Miller test.

First, the Sheriff put in no evidence other than the cassette tape. He called no expert witnesses concerning contemporary community standards, prurient interest, or serious artistic value. His evidence was the tape recording itself.

The appellants called psychologist Mary Haber, music critics Gregory Baker, John Leland and Rhodes Scholar Carlton Long. Dr. Haber testified that the tape

did not appeal to the average person's prurient interest.

Gregory Baker is a staff writer for New Times Newspaper, a weekly arts and news publication supported by advertising revenue and distributed free of charge throughout South Florida. Baker testified that he authored "hundreds" of articles about popular music over the previous six or seven years. After reviewing the origins of hip hop and rap music, Baker discussed the process through which rap music is created. He then outlined the ways in which 2 Live Crew had innovated past musical conventions within the genre and concluded that the music in "As Nasty As They Wanna Be" possesses [**6] serious musical value.

John Leland is a pop music critic for Newsday magazine, which has a daily circulation in New York, New York of approximately six hundred thousand copies, one of the top ten daily newspaper circulations in the country. Leland discussed in detail the evolution of hip hop and rap music, including the development of sampling technique by street disc jockeys over the previous fifteen years and the origins of rap in more established genres of music such as jazz, blues, and reggae. He emphasized that a Grammy Award for rap music was recently introduced, indicating that the recording industry recognizes rap as valid artistic achievement, and ultimately gave his expert opinion that 2 Live Crew's music in "As Nasty As They Wanna Be" does possess serious artistic value.

[*137] Of appellants' expert witnesses, Carlton Long testified most about the lyrics. Long is a Rhodes scholar with a Ph.D. in Political Science and was to begin an assistant professorship in that field at Columbia University in New York City shortly after the trial. Long testified that "As Nasty As They Wanna Be" contains three oral traditions, or musical conventions, known as call and response, doing the [**7] dozens, and boasting. Long testified that these oral traditions derive their roots from certain segments of Afro-American culture. Long described each of these conventions and cited examples of each one from "As Nasty As They Wanna Be." He concluded that the album reflects many aspects of the cultural heritage of poor, inner city blacks as well as the cultural experiences of 2 Live Crew. Long suggested that certain excerpts from "As Nasty As They Wanna Be" contained statements of political significance or exemplified numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification.

The Sheriff introduced no evidence to the contrary, except the tape.

Second, the case was tried by a judge without a jury, and he relied on his own expertise as to the community standard and artistic prongs of the Miller test.

The district court found that the relevant community was Broward, Dade, and Palm Beach Counties. He further stated:

This court finds that the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the [**8] community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a member of the community, he has personal

knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth.

In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

. . . . .

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the Nasty recording into evidence. As noted by the Supreme Court in Paris Adult Theatre I [v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973)], [**9] when the material in question is not directed to a 'bizarre, deviant group' not within the experience of the average person, the best evidence is the material, which 'can and does speak for itself.' Paris Adult Theatre I, 413 U.S. at 56 & n. 6, 93 S. Ct. at 2634 & n. 6.

In deciding this case, the court's decision is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find As Nasty As They Wanna Be obscene, he would be compelled to do so if the community's standards so required. n3

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n3 Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 589, 590 (S.D.Fla.1990).

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It is difficult for an appellate court to review value judgments. n4 Although, generally, these determinations are made in [*138] the first instance by a jury, n5 in this case the district [**10] judge served as the fact finder, which is permissible in civil cases. n6 Because a judge served as a fact finder, however, and relied only on his own expertise, the difficulty of appellate review is enhanced. n7 A fact finder, whether a judge or jury, is limited in discretion. n8 "Our standard of review must be faithful to both Rule 52(a) and the rule of independent review." n9 "The rule of independent review assigns to appellate judges a constitutional responsibility that cannot be delegated to the trier of fact," even where that fact finder is a judge. n10

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n4 See Marks v. United States, 430 U.S. 188, 198, 97 S. Ct. 990, 996, 51 L. Ed. 2d 260 (1977) (Stevens, J., concurring in part and dissenting in part); United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 & n. 7, 571 (9th Cir.1977); United States v. Obscene Magazines, Film & Cards, 541 F.2d 810, 811 (9th Cir.1976).

960 F.2d 134, *138; 1992 U.S. App. LEXIS 9592, **10;
20 Media L. Rep. 1114; 6 Fla. Law W. Fed. C 532

n5 Cf. Miller, 413 U.S. at 26-7, 93 S. Ct. at 2616.

n6 Penthouse, 610 F.2d at 1363 (citing e.g., Alexander v. Virginia, 413 U.S. 836, 93 S. Ct. 2803, 37 L. Ed. 2d 993 (1973)). [**11]

n7 In Penthouse Intern. Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.1980), the Court stated:

We realize that Judge Freeman, as a member of the community of Fulton County, Georgia, is probably able to determine whether the average person, applying contemporary community standards would find that a work taken as a whole appeals to the prurient interest. But in this case, we must exercise our power of independent review and declare that taken as a whole, 'Penthouse' and 'Oui' appeal to the prurient interest. . . .

. . . .

While we realize that Judge Freeman, as a member of the community, should possess insight as to what the average person of Fulton County, Georgia, applying contemporary community standards would find patently offensive, we must exercise our power of independent review. This is especially important because Judge Freeman may have not examined the question of 'describing sexual conduct.' We therefore conclude that the district court incorrectly determined that 'Penthouse' and 'Oui' do not include patently offensive depictions or descriptions of sexual conduct.

610 F.2d at 1364, 1366. See also United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 138 (2d Cir.1983) (Meskill, J. concurring in the result) ("On a prior appeal to this Court, a different panel of which I was a member, reversed [District] Judge Sweet's finding of non-obscenity because he had relied upon impermissible indicia of community standards. . . . Today, we affirm. In so doing, the majority accords uncommon deference to Judge Sweet's finding. . . . I am ill equipped to question Judge Sweet's assessment. Moreover, the government failed to introduce any evidence pertaining to community standards to facilitate our review. Had this case originated in the District of Connecticut, a community whose standards are familiar to me, I would not hesitate to reverse; but it did not. I reluctantly concur."). [**12]

n8 Penthouse, 610 F.2d at 1363. See Miller, 413 U.S. at 25, 93 S. Ct. at 2615.

n9 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 1959, 80 L. Ed. 2d 502, 515 (1983).

n10 Id. 466 U.S. at 501, 104 S. Ct. at 1959.

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In this case, it can be conceded without deciding that the judge's familiarity with contemporary community standards is sufficient to carry the case as to the first two prongs of the Miller test: prurient interest applying community standards and patent offensiveness as defined by Florida law. The record is insufficient, however, for this Court to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the

Miller analysis, which requires determination of whether a work "lacks serious artistic, scientific, literary or political value." n11

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n11 Miller, 413 U.S. at 24, 93 S. Ct. at 2615.

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[**13]

In Pope v. Illinois, n12 the Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards. n13 The Court reasoned that the fundamental principles of the First Amendment prevent the value of a work from being judged solely by the amount of acceptance it has won within a given community:

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n12 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

n13 Id. 481 U.S. at 500-01, 107 S. Ct. at 1920-21.

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Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. n14

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n14 Id. 481 U.S. at 500-01, 107 S. Ct. at 1921.

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[**14]

The Sheriff concedes that he has the burden of proof to show that the recording is obscene. Yet, he submitted no evidence to contradict the testimony that the work had artistic value. A work cannot be held obscene [*139] unless each element of the Miller test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.

REVERSED.

LEVEL 1 - 6 OF 6 CASES

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. STEVEN D. VAWTER AND DAVID J. KEARNS, DEFENDANTS-APPELLANTS

A-15 September Term 1993

Supreme Court of New Jersey

136 N.J. 56; 642 A.2d 349; 1994 N.J. LEXIS 430; 63 U.S.L.W. 2015

October 12, 1993, Argued
May 26, 1994, Decided

PRIOR HISTORY: [***1]

On certification to the Superior Court, Law Division, Monmouth County.

CORE TERMS: ordinance, first amendment, fighting, regulation, color, religion, violence, message, symbol, creed, burning, hatred, underinclusive, proscribable, gender, basis of race, religious, viewpoint, threats of violence, hate-crime, expressive, regulated, swastika, invalid, underinclusiveness, proscribe, target, bias-motivated, characterization, suppression

COUNSEL: Stephen M. Pascarella argued the cause for appellant David J. Kearns (Allegra, Pascarella & Nebelkopf, attorneys).

John T. Mullaney, Jr., argued the cause for appellant Steven D. Vawter.

Robert A. Honecker, Jr., Second Assistant Prosecutor, argued the cause for respondent (John Kaye, Monmouth County Prosecutor, attorney).

Debra L. Stone, Deputy Attorney General, argued the cause for amicus curiae, Attorney General of New Jersey (Fred DeVesa, Acting Attorney General, attorney).

JUDGES: For reversal and remandment -- Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi and Stein. Opposed -- None. The opinion of the Court was delivered by Clifford, J. Stein, J., concurring.

OPINIONBY: CLIFFORD

OPINION: [*61] [**352] Defendants are charged with violations of N.J.S.A. 2C:33-10 (Section 10) and -11 (Section 11), New Jersey's so-called hate-crime statutes. They contend that the statutes are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The trial court denied defendants' motion to dismiss the indictment, and the Appellate Division granted leave to appeal. We granted defendants' motion for direct certification, 133 N.J. 407, 627 A.2d 1123 (1993). Following, as we must, the United States Supreme Court's decision in R.A.V. v. City of St. Paul, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), we now declare the cited statutes unconstitutional, and therefore reverse the judgment below.

I

On May 13, 1991, a person or persons spray-painted a Nazi swastika and words appearing to read "Hitler Rules" (the spray-painters misspelled "Hitler") on a synagogue, Congregation B'nai Israel, in the Borough of Rumson. On that same night the same person or persons also spray-painted a satanic pentagram on the driveway of a Roman Catholic church, the Church of the Nativity, in the neighboring Borough of Fair Haven.

In March 1992 the Monmouth County Prosecutor's Office received confidential information from witnesses identifying defendants, Stephen Vawter and David Kearns, as the persons who had spray-painted the synagogue and the driveway of the church. In [*62] due course a Monmouth County grand jury returned a twelve-count indictment against Vawter and Kearns. Counts One through Four charged defendants with having put another in fear of violence by placement of a symbol or graffiti on property, a third-degree offense, in violation of Section 10; Counts Five through Eight charged defendants with fourth-degree defacement contrary to Section 11; Counts Nine and Ten charged defendants with third-degree criminal mischief in violation of N.J.S.A. 2C:17-3; and Counts Eleven and Twelve charged defendants with conspiracy to commit the offenses charged in Counts One through Ten.

Defendants moved to dismiss Counts One through Eight of the indictment on the ground that Sections 10 and 11 violate their First and Fourteenth Amendment rights under the United States Constitution. Section 10 reads as follows:

A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

Section 11 provides:

A person is guilty of a crime of the fourth degree if he purposely defaces or damages, without authorization of the owner or tenant, any private premises or property primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed or religion by placing thereon a symbol, an object, a characterization, an appellation, or graffiti that exposes another to threat of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to, a burning cross or Nazi swastika.

[**353] In denying defendants' motion to dismiss the first eight counts of the indictment the trial court, satisfied that it could distinguish Sections 10 and 11 from the St. Paul ordinance in R.A.V., held Sections 10 and 11 constitutional. On this appeal we address defendants' constitutional challenge to those sections.

[*63] II

Our cases recognize that "[i]n the exercise of police power, a state may enact a statute to promote public health, safety or the general welfare."

State, Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 499, 468 A.2d 150 (1983). The authority of the State to regulate is limited, however; a State may not exercise its police power in a manner "repugnant to the fundamental constitutional rights guaranteed to all citizens." Gundaker Cent. Motors v. Gassert, 23 N.J. 71, 79, 127 A.2d 566 (1956), appeal denied, 354 U.S. 933, 77 S.Ct. 1397, 1 L.Ed.2d 1533 (1957). Here, defendants charge that the statutes under which they were charged offend their fundamental constitutional right to freedom of speech under the First Amendment.

Sections 10 and 11 do not proscribe speech per se. Rather, they prohibit certain kinds of conduct. Section 10 prohibits the conduct of "put[ting] or attempt[ing] to put another in fear of bodily violence by placing on * * * property a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika." Section 11 forbids the conduct of "defac[ing] or damag[ing private premises or property] * * * by placing thereon a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to, a burning cross or Nazi swastika."

To decide whether the conduct proscribed by Sections 10 and 11 is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842, 846 (1974), we must determine whether "[a]n intent to convey a particularized message [i]s present" and whether those who view the message have a great likelihood of understanding it. Id. at 410-11, 94 S.Ct. at 2730, 41 L.Ed.2d at 847. The Supreme Court has concluded in a variety of contexts that conduct is sufficiently expressive to fall within the protections of the First [*64] Amendment. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (holding protected the burning of flag to protest government policies); Spence, supra, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (holding protected the placing of peace symbol on flag to protest invasion of Cambodia and killings at Kent State); Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (holding protected the wearing of black armbands to protest war in Vietnam).

In R.A.V., supra, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305, the United States Supreme Court determined that a St. Paul, Minnesota, Bias-Motivated Crime Ordinance proscribed expressive conduct protected by the First Amendment. The ordinance read:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

[St. Paul, Minn. Legis. Code @ 292.02 (1990).]

As one court has noted, "While the [R.A.V.] Court did not explicitly state that * * * acts prohibited by the [St. Paul ordinance] are expression cognizable by the First Amendment, such a conclusion necessarily precedes the Court's holding that the [ordinance] facially violate[s] the First Amendment." State v. Sheldon, 332 Md. 45, 629 A.2d 753, 757 (1993).

Taking the lead from the Supreme Court, States with similar hate-crime statutes have determined also that the conduct proscribed by their statutes constitutes protected expression. [**354] For example, the Court of Appeals of Maryland found that the conduct prohibited by its statute, "burn[ing] or caus[ing] to be burned any cross or other religious symbol upon any private or public property," Md.Code Ann., Crim. Law Art. 27, @ 10A, qualifies as speech for purposes of the First Amendment. Sheldon, supra, 629 A.2d at 757. The Maryland court reasoned that "[b]ecause of the[] well known and painfully apparent connotations of burning religious symbols, there can be no doubt that those who engage in [*65] such conduct intend to 'convey a particularized message,' or that those who witness the conduct will receive the message." Ibid.

Similarly, in State v. Talley, 122 Wash.2d 192, 858 P.2d 217, 230 (1993), the Supreme Court of Washington concluded that part of its hate-crime statute regulates speech for purposes of the First Amendment. That part of the Washington statute reads: "The following constitute per se violations of th[e malicious harassment statute]: (a) Cross burning; or (b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim." Wash. Rev.Code @ 9A.36.080(2). The Washington court declared that the statute "clearly regulates protected symbolic speech * * *." Talley, supra, 858 P.2d at 230. See also State v. Ramsey, 430 S.E.2d 511, 514 (S.C.1993) (finding that statute prohibiting placement of burning or flaming cross on public property or on private property without owner's permission regulates protected symbolic conduct).

Not all statutes dealing with hate crimes, however, necessarily regulate speech for purposes of the First Amendment. Although enactments like the St. Paul ordinance and the Maryland and Washington statutes have been viewed as regulating expression protected by the First Amendment, courts have found that victim-selection or penalty-enhancement statutes target mere conduct and do not restrict expression. Those statutes punish bias in the motivation for a crime by enhancing the penalty for that crime. See, e.g., Wisconsin v. Mitchell, 508 U.S. , , 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436, 447 (1993) (finding that statute increasing penalty for selecting target of crime based on race, religion, color, disability, sexual orientation, national origin, or ancestry of person "is aimed at conduct unprotected by the First Amendment"); People v. Miccio, 155 Misc.2d 697, 589 N.Y.S.2d 762, 764-65 (Crim.Ct.1992) (finding that statute that elevates crime of simple harassment to crime of aggravated harassment when bias motive is present targets only conduct); State v. Plowman, 314 Or. 157, 838 P.2d 558, 564-65 (1992), (finding that [*66] statute that elevates crime of assault from misdemeanor to felony when defendant acts because of perception of victim's race, color, religion, national origin, or sexual orientation is directed against conduct), cert. denied, U.S. , 113 S.Ct. 2967, 125 L.Ed.2d 666 (1993); Tally, supra, 858 P.2d at 222 (finding that Wash.Rev. Code @ 9A.36.080(1), which "enhances punishment for [criminal] conduct where the defendant chooses his or her victim because of [the victim's] perceived membership in a protected category," is aimed at conduct). We are satisfied, however, that Sections 10 and 11 are more similar to the former category of statute than to the latter. Sections 10 and 11 do not increase the penalty for an underlying offense because of a motive grounded in bias; rather, those sections make criminal the expressions of hate themselves.

We therefore conclude that Sections 10 and 11 regulate expression protected by the First Amendment. When a person places a Nazi swastika on a synagogue or burns a cross in an African-American family's yard, the message sought to be conveyed is clear: by painting the swastika or by burning the cross, a person intends to express hatred, hostility, and animosity toward Jews or toward African-Americans. "There are certain symbols * * * that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups." Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich.L.Rev. 2320, 2365 (1989). Such messages are not only offensive and contemptible, they are all too easily understood. In fact, the sort of conduct [**355] regulated by Sections 10 and 11 is a successful, albeit a reprehensible, vehicle for communication: "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide." Id. at 2336. Thus, Sections 10 and 11 meet the requirements of Spence, supra, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842, in that they address conduct that is heavily laden with an unmistakable message. Those sections therefore regulate speech for purposes of the First Amendment.

[*67] In concluding that the statutes regulate protected expression, we reject the argument of the Attorney General and of the trial court that because Sections 10 and 11 "require a specific intent to threaten harm against another because of [ ] race," State v. Davidson, 225 N.J.Super. 1, 14, 541 A.2d 700 (App.Div.1988), those statutes regulate only conduct. In State v. Finance American Corp., 182 N.J.Super. 33, 38, 440 A.2d 28 (1981), the Appellate Division found that because N.J.S.A. 2C:33-4, the harassment statute, requires the speaker to have the specific intent to harass the listener, the statute regulates conduct. Sections 10 and 11, however, do more than add a specific intent requirement. As we have noted, the statutes regulate expression itself. Thus, we must analyze Sections 10 and 11 under the appropriate level of First Amendment scrutiny.

III

The Supreme Court has observed that although governments have a "freer hand" in regulating expressive conduct than in regulating pure speech, they may not "proscribe particular conduct because it has expressive elements." Johnson, supra, 491 U.S. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 354-55. "'A law directed at the communicative nature of conduct must * * * be justified by the substantial showing of need that the First Amendment requires.'" Id. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 355 (quoting Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C.Cir.1983) (Scalia, J., dissenting)).

If "'the governmental interest [behind Sections 10 and 11] is unrelated to the suppression of free expression,'" id. at 407, 109 S.Ct. at 2540, 105 L.Ed.2d at 355 (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)), the First Amendment requires that the regulation meet only the lenient O'Brien test. Under that test,

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free [*68] expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

[O'Brien, supra, 391 U.S. at 377, 88 S.Ct. at 1679, 20 L.Ed.2d at 680.]

If Sections 10 and 11 relate to the suppression of free expression, we must decide if the statutes are content neutral or content based to determine the level of scrutiny that we should apply under the First Amendment. "The principal inquiry in determining content-neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661, 675 (1989). If a regulation is content neutral, "reasonable time, place, or manner restrictions" are appropriate. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Time, place, or manner regulations are reasonable if they are "narrowly tailored to serve a significant governmental interest, and [] they leave open ample alternative channels for communication * * *." Ibid.

If, however, we decide that Sections 10 and 11 relate to the suppression of free expression and that they are content based, the strictest judicial scrutiny is warranted: "Content-based statutes are presumptively invalid." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 317. To survive strict scrutiny, a regulation must be [**356] "necessary to serve a compelling state interest and [it must be] narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804 (1983).

We conclude that Sections 10 and 11 are content-based restrictions. In adopting those sections the Legislature was obviously expressing its disagreement with the message conveyed by the conduct that the statutes regulate. The State argues that the statutes are "directed primarily against conduct" and that they only "incidentally sweep up" speech. Although the legislative history is not instructive, other factors persuade us that the State's characterization of Sections 10 and 11 is incorrect.

[*69] First, New Jersey had statutes proscribing the same conduct as Sections 10 and 11 before the enactment of those sections in 1981. Section 10 deals with "placing on public or private property a symbol, an object, a characterization, an appellation or graffiti * * *." Section 11 deals with "defac[ing] or damag[ing] * * * private premises or property * * *." Yet, other statutes proscribe exactly the same conduct: first, the criminal-mischief statute, N.J.S.A. 2C:17-3, prohibits damaging or tampering with the tangible property of another (the State charged defendants, Vawter and Kearns, under that statute in addition to Sections 10 and 11); second, the criminal-trespass statute, N.J.S.A. 2C:18-3, forbids entering or remaining in any structure that one knows one is not licensed or privileged to enter; and finally -- if the offense is cross burning and if the conditions of the incident are appropriate -- the arson statute, N.J.S.A. 2C:17-1, criminalizes starting a fire, thereby putting another person in danger of death or bodily injury or thereby placing a building or structure in danger of damage or destruction. Thus, the Legislature enacted Sections 10 and 11 specifically to condemn the expression of biased messages. Even in the absence of those statutes the State could have continued to punish the conduct of painting racially- or religiously-offensive graffiti or of burning a cross under then-existing laws.

Second, the statements of Governor Byrne, who signed Sections 10 and 11 into law, and the circumstances surrounding the signing support a finding that the Legislature adopted Sections 10 and 11 to denounce racially- or religiously-biased messages. As the Governor declared in his conditional veto, for technical reasons, of an earlier version of the statutes:

Our democratic society must not allow intimidation of racial, ethnic or religious groups by those who would use violence or would unlawfully vent their hatred. All members of racial, ethnic or religious groups must be able to participate in our society in freedom and with a full sense of security. This is what distinguishes America. And this is what this bill preserves.

[Governor's Veto Message to Assembly Bill No. 334 (June 15, 1981).]

By that statement, the Governor declared his, and the general, understanding that the Legislature's purpose was to announce its disagreement with the expression of biased messages. Moreover, [*70] on September 10, 1981, Governor Byrne signed the statutes into law at Congregation B'nai Yeshrun in Teaneck, a synagogue that had been defaced with swastikas and obscenities in October 1979. That special signing ceremony (at which the Governor and the sponsors of the legislation, Assemblyman Baer and Senator Feldman, spoke) demonstrates also that the statutes were aimed specifically at denouncing messages of hatred. Thus, we conclude that the Governor and the Legislature, by enacting Sections 10 and 11, intended to regulate expressions of racial and religious hatred.

The intent and purpose behind the statutes could hardly be more laudable. And yet the unmistakable fulfillment of that purpose is what renders Sections 10 and 11 content-based restrictions. As the Supreme Court emphasized in Ward, supra, 491 U.S. at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675, "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose [in enacting a statute] is the controlling consideration." That Sections 10 and 11 are content based is not the end of our inquiry, however. Although [**357] presumptively invalid, content-based restrictions are nevertheless permissible in some instances.

IV

Ordinarily, we would ascertain at this point whether Sections 10 and 11 are narrowly tailored to serve a compelling State interest. Before applying strict scrutiny, however, we depart reluctantly from what we consider traditional First Amendment jurisprudence to analyze our statutes in light of Justice Scalia's five-member majority opinion in R.A.V., supra, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305. Although we are frank to confess that our reasoning in that case would have differed from Justice Scalia's, we recognize our inflexible obligation to review the constitutionality of our own statutes using his premises. See Battaglia v. Union County Welfare Bd., 88 N.J. 48, 60, 438 A.2d 530 (1981) (noting [*71] that New Jersey Supreme Court is "bound by the [United States] Supreme Court's interpretation and application of the First Amendment and its impact upon the states under the Fourteenth Amendment"), cert. denied, 456 U.S. 965, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982).

In R.A.V., the United States Supreme Court concluded that the Bias-Motivated Crime Ordinance of St. Paul, Minnesota, is unconstitutional because "it

prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 316. The defendant in that case and several teenagers had burned a cross inside the fenced yard of an African-American family. Although the State could have punished the defendant's conduct under several statutes, including those prohibiting terroristic threats, arson, and criminal damage to property, id. at n. 1, 112 S.Ct. at 2541 n. 1, 120 L.Ed.2d at 315 n. 1, St. Paul chose to charge the defendant under its Bias-Motivated Crime Ordinance, quoted supra, at 64, 642 A.2d at 353.

The defendant challenged the St. Paul ordinance as "substantially overbroad and impermissibly content-based" under the First Amendment. 505 U.S. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 315. The trial court dismissed the charge against the defendant, but the Minnesota Supreme Court reversed, holding that the ordinance reaches only fighting words and thus proscribes only expression that remains unprotected by the First Amendment. In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991). The Minnesota Supreme Court concluded that because the ordinance was narrowly tailored to promote a compelling government interest, it survived constitutional attack. Id. at 511.

In invalidating the ordinance, Justice Scalia accepted as authoritative the Minnesota Supreme Court's statement that "the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of Chaplinsky[v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942) (defining "fighting words" as "conduct that itself inflicts injury or tends to incite immediate violence")]." R.A.V., supra, 505 U.S. at , [*72] 112 S.Ct. at 2542, 120 L.Ed.2d at 316. Justice Scalia then reasoned that although "[c]ontent-based regulations are presumptively invalid," id. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 317, our society permits restrictions on "the content of speech in a few limited areas * * *." Id. at , 112 S.Ct. at 2542-43, 120 L.Ed.2d at 317 (citing Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035). Those areas include obscenity, defamation, and fighting words. Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317. Justice Scalia pointed out that although the Supreme Court has sometimes said that those proscribable categories are "'not within the area of constitutionally protected speech'", ibid. (quoting Roth v. United States, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506 (1957)), that proposition is not literally true. Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317-18. In fact, those areas of proscribable speech can "be made vehicles for content discrimination * * *." Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 318. Thus, the Supreme Court reads the First Amendment to impose a content-discrimination limitation on a State's prohibition of proscribable speech. Id. at , 112 S.Ct. at 2545-46, 120 L.Ed.2d at 320.

Justice Scalia, however, noted exceptions to the prohibition against content discrimination [**358] in the area of proscribable speech. The first exception to the prohibition exists "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." Id. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320-21. A second exception is found when a "subclass [of proscribable speech] happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the * * * speech.'" Id. at , 112 S.Ct. at 2546, 120 L.Ed.2d at 321 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29, 38

(1986)). The final classification is a catch-all exception for those cases in which "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 322.

[*73] Applying the foregoing principles, Justice Scalia determined that the St. Paul ordinance is facially unconstitutional, even if read as construed by the Minnesota Supreme Court to reach only "fighting words." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. The vice of the ordinance, as perceived by the Supreme Court majority, is that it is content discriminatory; in fact, the ordinance "goes even beyond mere content discrimination to actual viewpoint discrimination." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics[: race, color, creed, religion, or gender]." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323.

Justice Scalia found that the St. Paul ordinance does not fall within any of the exceptions to the prohibition on content discrimination. The ordinance does not fit within the first exception for content discrimination -- the entire class of speech is proscribable -- because

> fighting words are categorically excluded from the protection of the First Amendment [because] their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression * * *. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.
>
> [Id. at , 112 S.Ct. at 2548-49, 120 L.Ed.2d at 324.]

Nor does the ordinance fit within the second exception -- discrimination aimed only at secondary effects -- because neither listeners' reactions to speech nor the emotive impact of speech is a secondary effect. Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325 (citing Boos v. Barry, 485 U.S. 312, 321, 108 S.Ct. 1157, 1163-64, 99 L.Ed.2d 333, 344-45 (1988)). Finally, Justice Scalia concluded that "[i]t hardly needs discussion that the ordinance does not fall within [the third] more general exception permitting all selectivity that for any reason is beyond the suspicion of official suppression of ideas." Id. at , 112 S.Ct. at 2549, 120 L.Ed. at 325.

Applying R.A.V. to this appeal, we conclude that even if we were to read Sections 10 and 11 to regulate only fighting words, a [*74] class of proscribable speech, those statutes do not fit within any of the exceptions to the prohibition against content discrimination.

The Attorney General argues that because Sections 10 and 11 regulate only threats of violence, those sections fall within the first exception for content discrimination -- the entire class of speech is proscribable. In discussing threats under the first exception Justice Scalia pointed out that

> the Federal Government can criminalize [] those threats of violence that are directed against the President, see 18 U.S.C. @ 871, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the

possibility that the threatened violence will occur) have special force when applied to the President.

[Id. at , 112 S.Ct. at 2546, 120 L.Ed.2d at 321.]

But Justice Scalia observed that "the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities." Ibid.

[**359] We see two shortcomings in the Attorney General's argument that because our statutes are permissible regulations of threats, they fit within the first exception. First, the statutes do not prohibit only threats. Section 10 prohibits "put[ing] or attempt[ing] to put another in fear of bodily violence by placing on public or private property a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion * * *." (Emphasis added.) Section 11 precludes "defac[ing] or damag[ing] * * * private premises or property * * * by placing thereon a symbol * * * that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion * * *." (Emphasis added.) Thus, Sections 10 and 11 proscribe not only threats of violence but also expressions of contempt and hatred. Moreover, on close examination the "contempt and hatred" language may pose vagueness and overbreadth issues. We need not address those issues, however, because we could apply a limiting construction to restrict the application of Sections 10 and 11 only to threats of violence.

[*75] But even if we were somehow to construe Sections 10 and 11 to proscribe only threats of violence, we would encounter another problem: our statutes proscribe threats "on the basis of race, color, creed or religion." Under the Supreme Court's ruling in R.A.V., that limitation renders the statutes viewpoint-discriminatory and thus impermissible. Although a statute may prohibit threats, it may not confine the prohibition to only certain kinds of threats on the basis of their objectionable subject matter. Thus, the first exception cannot save Sections 10 and 11.

Nor does the second exception for discrimination aimed only at secondary effects rescue Sections 10 and 11. The only secondary effects the statutes arguably could target are the same secondary effects the St. Paul ordinance targeted in R.A.V., namely, "'protect[ion] against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.'" 505 U.S. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325 (quoting Brief for Respondent, City of St. Paul). Thus, Sections 10 and 11 fail for the same reason that the St. Paul ordinance failed: secondary effects do not include listeners' reactions to speech or the emotive impact of speech. Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325.

Finally, just as in R.A.V., our statutes do not fall within the third, more general exception for discrimination that is unrelated to official suppression of ideas. As we noted, supra at 67, 642 A.2d at 355, the Legislature enacted Sections 10 and 11 specifically to outlaw messages of racial or religious hatred. Thus, we cannot say that Sections 10 and 11 are unrelated to the official suppression of ideas.

The decisions of other State courts support our conclusion that Sections 10 and 11 do not fall within any of the exceptions to the prohibition on content discrimination. See Sheldon, supra, 629 A.2d at 761-62, (concluding that Maryland statute precluding "burn[ing] or caus[ing] to be burned any cross or other religious symbol upon any private or public property" did not fall within [*76] any of the R.A.V. exceptions); Talley, supra, 858 P.2d at 231 (finding that Washington statute prohibiting "(a) Cross Burning; or (b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim" falls squarely within the prohibitions of R.A.V.). But see In re M.S., 22 Cal.App.4th 988, 22 Cal.Rptr.2d 560, 570-71 (Ct.App.1993) (finding that California statute providing that no person may "by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person * * * because of the other person's race, color, ancestry, national origin, or sexual orientation," and that "no person shall be convicted * * * based upon speech alone, [unless] the speech itself threatened violence" falls within all three R.A.V. exceptions).

V

Strict scrutiny requires that a regulation be narrowly drawn to achieve a compelling state interest. Burson v. Freeman, [**360] 504 U.S. , , 112 S.Ct. 1846, 1851, 119 L.Ed.2d 5, 14 (1992). So exacting is the inquiry under strict scrutiny that the Supreme Court "readily acknowledges that a law rarely survives such scrutiny * * *." Id. at , 112 S.Ct. at 1852, 119 L.Ed.2d at 15. "The existence of adequate content-neutral alternatives * * * 'undercut[s] significantly' any defense [that a] statute [is narrowly-tailored]." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2550, 120 L.Ed.2d at 326 (quoting Boos, supra, 485 U.S. at 329, 108 S.Ct. at 1168, 99 L.Ed.2d at 349).

In R.A.V., supra, the Supreme Court rejected the argument that the St. Paul ordinance survives strict scrutiny. 505 U.S. at , 112 S.Ct. at 2549-50, 120 L.Ed.2d at 325-26. Justice Scalia did find a compelling interest: "the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination * * *." Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 325. But he concluded that the St. Paul ordinance is not narrowly tailored because "[a]n ordinance not [*77] limited to the favored topics, for example, would have precisely the same beneficial effect." Id. at , 112 S.Ct. at 2550, 120 L.Ed.2d at 326. Thus, the St. Paul ordinance is underinclusive and fails the strict-scrutiny analysis. Accord Sheldon, supra, 629 A.2d at 762-63 (finding that Maryland's statute fails strict scrutiny); Talley, supra, 858 P.2d at 230-31 (finding Washington statute unconstitutional).

We conclude that Sections 10 and 11 are underinclusive and thus impermissible under R.A.V. Sections 10 and 11 serve the same compelling state interest that the St. Paul ordinance served: protecting the human rights of members of groups that historically have been the object of discrimination. But our hate-crime statutes, like the St. Paul ordinance, are not narrowly tailored. R.A.V. dictates that where other content-neutral alternatives exist, a statute directed at disfavored topics is impermissible. Inasmuch as the language of Sections 10 and 11 limits their scope to the disfavored topics of race, color, creed, and religion, the statutes offend the First Amendment.

VI

The judgment of the trial court is reversed. The cause is remanded to the Law Division for entry there of judgment dismissing counts one through eight of the indictment and for further proceedings as may be appropriate on the remaining counts.

CONCURBY: STEIN

CONCUR: STEIN, J., concurring.

I join the Court's opinion declaring unconstitutional N.J.S.A. 2C:33-10 and -11, New Jersey's so-called hate-crime statutes. Variations of New Jersey's statutes have been enacted in most states, reflecting a national consensus that bias-motivated violence or bias-motivated conduct that tends to incite violence has reached epidemic proportions warranting the widespread enactment of laws criminalizing such behavior. I agree especially with the Court's acknowledgment, ante at 61, 642 A.2d at 352, that we declare New Jersey's hate-crime statutes unconstitutional because [*78] we are compelled to do so by the United States Supreme Court's decision in R.A.V. v. City of St. Paul, 505 U.S. , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), a decision that the Court characterizes as one requiring that "we depart reluctantly from what we consider traditional First Amendment jurisprudence * * *." Ante at 70, 642 A.2d at 357.

I write separately to explain my disagreement and dismay over the United States Supreme Court's decision in R.A.V. My views concerning the merits of the Supreme Court's opinion in R.A.V. are, of course, irrelevant to our disposition of this appeal. In cases that turn on interpretations of the United States Constitution, our mandate is simple -- to adhere to the decisions of our nation's highest Court, whose authority is final. Criticism by a state court judge addressed to a Supreme Court decision interpreting the federal Constitution might be regarded as intemperate, tending "inevitab[ly] [to shadow] the moral authority of the United States Supreme Court." State v. Hempele, 120 N.J. 182, 226, 576 A.2d 793 (1990) (O'Hern, J., concurring in part and dissenting in part). As Justice O'Hern observed in Hempele:
[**361] Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties.

The most distinct aspect of our free society under law is that all acts of government are subject to judicial review. Whether we have agreed with the Supreme Court or not, we have cherished most its right to make those judgments. In no other society does the principle of judicial review have the moral authority that it has here.

[Ibid.]

The R.A.V. decision, however, is extraordinary. Its principal impact is to invalidate the hate-crime statutes of New Jersey and of numerous other states, statutes that undoubtedly were drafted with a view toward compliance with First Amendment standards. See, e.g., State v. Sheldon, 332 Md. 45, 629 A.2d 753, 763 (1993); State v. Ramsey, 430 S.E.2d 511, 514-15 (S.C.1993); State v. Talley, 122 Wash.2d 192, 858 P.2d 217, 230 (1993). That effect alone warrants close examination of R.A.V.'s rationale, so substantial is the number of state legislatures that had determined that [*79] conduct constituting so-called

"hate-crimes" should be criminalized, and that that objective could be achieved consistent with the First Amendment. See Talley, supra, 858 P.2d at 219 (noting that "[n]early every state has passed what has come to be termed a 'hate crimes statute'"); see also Hate Crimes Statutes: A 1991 Status Report, ADL Law Report (Anti-Defamation League of B'nai B'rith, New York, N.Y.), 1991, at 6-10 (describing types of hate-crime statutes enacted by various states) (hereinafter 1991 Status Report). If only to learn where they went astray, state legislators, as well as their constituents whose complaints inspired enactment of hate-crime laws, have a special interest in understanding R.A.V.'s holding.

Another, and more disconcerting, aspect of the Supreme Court's decision in R.A.V., given its national significance, is the severity and intensity of the criticism that the four concurring members addressed to the rationale adopted by the majority opinion. Those members joined the Court's judgment only, not its opinion. Their objections to the Court's opinion convey a sense of astonishment about the Court's unexpected treatment of the First Amendment questions. Justice White observed:

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

* * *

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

[505 U.S. at , , 112 S.Ct. at 2551, 2560, 120 L.Ed.2d at 328, 339.]

Justice Blackmun's concurring opinion questioned the majority's true objectives:

[*80] I regret what the Court has done in this case. The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening.

* * *

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration -- a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits [**362] hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

[505 U.S. at , 112 S.Ct. at 2560-61, 120 L.Ed.2d at 339.]

The concurring opinion of Justice Stevens emphasizes, as did Justice White's, the extent of R.A.V.'s departure from generally-accepted First Amendment principles:

Within a particular "proscribable" category of expression, the Court holds, a government must either proscribe all speech or no speech at all. This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

* * *

In sum, the central premise of the Court's ruling -- that "[c]ontent-based regulations are presumptively invalid" -- has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. Finally, although the Court recognizes exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny.

[505 U.S. at , , 112 S.Ct. at 2562-63, 2566, 120 L.Ed.2d at 341-42, 345-46 (footnote omitted).]

My focus is on the central holding and, in my view, the basic flaw in the R.A.V. opinion: that the St. Paul Bias-Motivated Crime Ordinance impermissibly regulates speech based on its content, 505 U.S. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323, [*81] and on its viewpoint, ibid., and cannot be sustained on the ground that the ordinance is narrowly tailored to serve compelling state interests. Id. at , 112 S.Ct. at 2549-50, 120 L.Ed.2d at 325-26.

I

Using language substantially similar to that contained in New Jersey's hate-crime statutes, N.J.S.A. 2C:33-10 and -11, the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, invalidated by the Court in R.A.V., provided:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

[Id. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 315 (quoting St. Paul, Minn. Legis.Code @ 292.02 (1990)).]

The defendant in R.A.V. was prosecuted under the St. Paul Bias-Motivated Crime Ordinance because he, along with some teenagers, had burned a cross

during the night inside the fenced yard of a house occupied by an African-American family. The trial court dismissed the charge before trial, concluding that the ordinance prohibited expressive conduct in violation of the First Amendment. The Minnesota Supreme Court reversed, construing the ordinance as prohibiting only "'fighting words' -- conduct that itself inflicts injury or tends to incite immediate violence." In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942)). Concluding that the ordinance prohibited only conduct unprotected by the First Amendment and was "narrowly tailored * * * [to accomplish] the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," the Minnesota Supreme Court sustained the validity of the St. Paul ordinance. Id. at 511.

The R.A.V. Supreme Court majority opinion declined to address the contention that the St. Paul ordinance was invalidly overbroad. [**363] 505 U.S. at , 112 S.Ct. at 2542, 120 L.Ed.2d at 316. The [*82] concurring Justices, however, agreed with Justice White's conclusion that although the Minnesota Supreme Court had construed the ordinance to prohibit only fighting words, the Minnesota Court nevertheless had emphasized that the ordinance prohibits "'only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.'" Id. at , 112 S.Ct. at 2559, 120 L.Ed.2d at 338 (White, J., concurring in the judgment) (quoting In re Welfare of R.A.V., supra, 464 N.W.2d at 510); see id. at , 112 S.Ct. at 2561, 120 L.Ed.2d at 339 (Blackmun, J., concurring in the judgment); id. at , 112 S.Ct. at 2561, 120 L.Ed.2d at 340 (Stevens, J., concurring in the judgment). Justice White, understanding the Minnesota Supreme Court to have ruled "that St. Paul may constitutionally prohibit expression that 'by its very utterance' cause 'anger, alarm or resentment,'" 505 U.S. at , 112 S.Ct. at 2559, 120 L.Ed.2d at 338, concluded that the ordinance was invalid because of overbreadth:

> Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.
>
> In the First Amendment context, "[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Houston v. Hill, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face.
> [Id. at , 112 S.Ct. at 2559-60, 120 L.Ed.2d at 338-39 (citations omitted) (footnote omitted).]

Ignoring the overbreadth issue, the Supreme Court majority opinion accepted as authoritative the Minnesota Supreme Court's determination that the St. Paul ordinance reached only conduct that amounts to fighting words, in accordance with Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035 (defining "fighting words" as "conduct that itself inflicts injury or tends to incite immediate violence"). R.A.V., supra, 505 U.S. at , 112 [*83]

S.Ct. at 2541, 120 L.Ed.2d at 316. The Court acknowledged that fighting words, along with defamation and obscenity, are among the categories of speech with respect to which restrictions on content are permitted because they are "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 317 (quoting Chaplinsky, supra, 315 U.S. at 572, 62 S.Ct. at 769, 86 L.Ed. at 1035). Although the Supreme Court has said that those proscribable categories of expression are "'not within the area of constitutionally protected speech,'" ibid. (quoting Roth v. United States, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506 (1957)), the R.A.V. majority opinion observed that that characterization is not literally true, noting that those categories of speech "can * * * be regulated because of their constitutionally proscribable content," but cannot be made "the vehicles for content discrimination unrelated to their distinctively proscribable content." Id. at , 112 S.Ct. at 2543, 120 L.Ed.2d at 318. Accordingly, the Court noted: "The government may not regulate use [of fighting words] based on hostility -- or favoritism -- towards the underlying message expressed." Id. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320.

Having established its basic premise that even fighting words, a category of generally-proscribable speech, can be a vehicle for content discrimination, the R.A.V. opinion concludes that the St. Paul ordinance is facially unconstitutional because it impermissibly discriminates based on the subject of bias-motivated speech. Id. at , 112 S.Ct. at 2547-48, 120 L.Ed.2d at 323-24. The Court notes that the St. Paul ordinance applies [**364] only to fighting words that provoke violence "on the basis of race, color, creed, religion or gender"; but that those who wish to use fighting words -- "to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered." Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323. The Court determined that that distinction in the content of the speech regulated by the St. Paul ordinance was unconstitutional: "The First [*84] Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Ibid. In effect, the Court concluded that St. Paul could regulate all fighting words or none, but could not single out for regulation only those fighting words that provoke violence based on race, color, creed, religion, or gender.

The Court then determined that the St. Paul ordinance also constituted viewpoint discrimination:

> "Fighting words" that do not themselves invoke race, color, religion, or gender -- aspersions upon a person's mother, for example -- would seemingly be usable [at pleasure] in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by the speaker's opponents. * * * St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.
>
> [Ibid.]

In that respect the majority opinion viewed the St. Paul ordinance as one taking sides in a dispute between racists and their targets. "By prohibiting fighting words based on race, while allowing other fighting words, the law barred only the fighting words that the racists (and not the fighting words that their targets) would wish to use." Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of

Content-Based Underinclusion, 1992 Sup.Ct.Rev. 29, 70.

In prohibiting fighting words that provoke violence only on the basis of race, color, creed, religion, or gender, the St. Paul ordinance obviously regulates "speech" based on its content: speech that provokes violence because it is addressed to the five prohibited subjects is barred; speech that provokes violence because it is addressed to other subjects -- political affiliation, union membership, or homosexuality, for example -- is not barred. Aside from overbreadth problems, Justices White and Stevens, although for different reasons, would have upheld the ordinance even though they acknowledged that it regulated speech based on its content. In the view of Justice White, the majority's concession that the St. Paul ordinance regulates only fighting words to which "the First Amendment does not apply * * * because their expressive [*85] content is worthless or of de minimis value to society," 505 U.S. at , 112 S.Ct. at 2552, 120 L.Ed.2d at 328, (White, J., concurring), establishes that a content-based regulation of fighting words is insulated from First Amendment review:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, [New York v. Ferber, 458 U.S. 747, 763-64, 102 S.Ct. 3348, 3358-59, 73 L.Ed.2d 1113, 1126-27 (1982)]; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

[Id. at , 112 S.Ct. at 2553, 120 L.Ed.2d at 330.]

In addition, Justice White urged that even if the ordinance constituted a content-based regulation of protected expression, it would survive strict-scrutiny review as a regulation serving a compelling state interest narrowly drawn to achieve that purpose. Rejecting the majority's observation that the St. Paul ordinance could not survive strict scrutiny because "[a]n ordinance not limited to the favored topics would have precisely the same beneficial effect," id. at , 112 S.Ct. at 2541, 120 L.Ed.2d at 325, Justice White relied on Burson v. Freeman, 504 U.S. , 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), in which a plurality of the Court sustained a Tennessee statute prohibiting the solicitation of votes and the distribution of campaign literature [**365] within one-hundred feet of the entrance to a polling place. Noting that the statute in Burson restricted only political speech, Justice White observed that the Burson plurality had

squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms: "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." [505 U.S. at , 112 S.Ct. at 2555, 120 L.Ed.2d at 332 (quoting Burson, supra, 504 U.S. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 20) (emphasis added).]

Justice Stevens was unwilling to rely on the majority's concession that the St. Paul ordinance regulates only fighting words, observing that "[t]he categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment." Id. at , 112 S.Ct. at 2566-67, 120 L.Ed.2d at 347 (Stevens, J., concurring). In that respect Justice [*86] Stevens's view is consistent with that of commentators who have urged abandonment of or diminished reliance on the fighting-words doctrine. See, e.g., Laurence H. Tribe, American Constitutional Law, @ 12-18, at 929 n.

9 (2d ed. 1988); Stephen W. Gard, Fighting Words as Free Speech, 58 Wash.U.L.Q. 531 (1980); Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U.Chi.L.Rev. 20, 30-35 (1975); Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 508-14. Rejecting the categorical approach as one that "sacrifices subtlety for clarity," 505 U.S. at , 112 S.Ct. at 2566, 120 L.Ed.2d at 346, Justice Stevens similarly rejected as "absolutism" the majority's view that content-based regulations, even of fighting words, are presumptively invalid. Id. at , 112 S.Ct. at 2564, 120 L.Ed.2d at 343. Observing that selective regulation of speech based on content was unavoidable, Justice Stevens noted that the Court frequently had upheld content-based regulations of speech. Ibid. (citing FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (upholding restriction on broadcast of specific indecent words); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (upholding zoning ordinances that regulated movie theaters based on content of films shown); Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding ordinance prohibiting political advertising but permitting commercial advertising on city buses); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (upholding state statute restricting speech of state employees concerning partisan political matters)).

As an alternative to Justice White's categorical approach and the majority's formulation that content-based regulation is presumptively invalid, Justice Stevens observed that the Court's First Amendment jurisprudence reveals "a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech." 505 U.S. at , 112 S.Ct. at 2567, 120 L.Ed.2d at 347. Justice Stevens explained that "the scope of protection provided expressive [*87] activity depends in part upon its content and character," id. at , 112 S.Ct. at 2567, 120 L.Ed.2d at 348, noting that the First Amendment accords greater protection to political speech than to commercial speech or to sexually explicit speech, id. at , 112 S.Ct. at 2567-68, 120 L.Ed.2d at 348, and that "'government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'" Id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 348 (quoting Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342, 354-55 (1989)). Moreover, he noted that the context of the regulated speech affects the scope of protection afforded it. Thus, "the presence of a '"captive audience,"'" ibid. (quoting Lehman, supra, 418 U.S. at 302, 94 S.Ct. at 2717, 41 L.Ed.2d at 776 (quoting Public Util. Comm'n v. Pollack, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068, 1080 (1952) (Douglas, J., dissenting))), or "the distinctive character of a secondary-school environment," ibid., affects the Court's First Amendment analysis. Similarly, Justice Stevens observed that the nature of a restriction [**366] on speech "informs our evaluation of its constitutionality," id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 348-49, noting that restrictions based on viewpoint are regarded as more pernicious than those based only on subject matter. Id. at , 112 S.Ct. at 2568, 120 L.Ed.2d at 349. Finally, Justice Stevens noted that the scope of content-based restrictions affect their validity. Id. at , 112 S.Ct. at 2569, 120 L.Ed.2d at 349.

That analytical framework illuminates the critical distinction between Justice Stevens' evaluation of the St. Paul ordinance and that of the majority. The Court's approach is presumptive and categorical. The majority concluded that the St. Paul ordinance distinguishes -- as it surely does -- between

fighting words addressed to the restricted subjects and all other fighting words. Viewing that distinction as one based impermissibly on content, the Court rejected the contention that the ordinance is narrowly tailored to serve compelling state interests because "[a]n ordinance not limited to the favored topics * * * would have precisely [*88] the same beneficial effect." Id. at , 112 S.Ct. at 2549, 120 L.Ed.2d at 326.

In sharp contrast, Justice Stevens first assessed the content and character of the regulated activity, noting that the ordinance applies only to "low-value speech, namely, fighting words," and that it regulates only "'expressive conduct [rather] than * * * the written or spoken word.'" Id. at , 112 S.Ct. at 2569, 120 L.Ed.2d at 350 (quoting Johnson, supra, 491 U.S. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 355) (alterations in original). Concerning context, he noted that the ordinance restricts speech only "in confrontational and potentially violent situations," ibid., such as that illustrated by the case at hand: "The cross-burning in this case -- directed as it was to a single African-American family trapped in their home -- was nothing more than a crude form of physical intimidation. That this crossburning sends a message of racial hostility does not automatically endow it with complete constitutional protection." Ibid. Finally, Justice Stevens concluded that St. Paul's restriction on speech is based neither on subject matter nor viewpoint, "but rather on the basis of the harm the speech causes. * * * [T]he ordinance regulates only a subcategory of expression that causes injuries based on 'race, color, creed, religion or gender,' not a subcategory that involves discussions that concern those characteristics." Id. at , 112 S.Ct. at 2570, 120 L.Ed.2d at 350-51.

II

Regulation of speech based on content, subject matter, or viewpoint has attracted an outpouring of scholarly commentary. See, e.g., Daniel A. Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo.L.J. 727 (1980); Karst, supra, 43 U.Chi.L.Rev. 20; Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan.L.Rev. 113 (1981); Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand.L.Rev. 265 (1981); Paul B. Stephan III, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203 [*89] (1982); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L.Rev. 189 (1983); Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81 (1978); Cass R. Sunstein, Words, Conduct, Caste, 60 U.Chi.L.Rev. 795 (1993). Although variations in the formulation of contentbased regulation of speech may present difficult and controversial First Amendment questions, courts need not abandon pragmatism and common sense in favor of "arid, doctrinaire interpretation." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2560, 120 L.Ed.2d at 339 (White, J., concurring). Even those commentators who advocate a categorical approach to First Amendment adjudication acknowledge the need to allow for enough play in the joints to avoid anomalous results:

What we mean when we express animosity towards content regulation is that we should not create subcategories within the first amendment that are inconsistent with the theoretical premises of the concept of freedom of speech. Moreover, we do not wish to create subcategories that, either because of the inherent indeterminacy of the category or because of the difficulty in [**367] verbally describing that subcategory, create an undue risk of oversuppression. While these are powerful reasons, they are not so conclusive that they should

prevail in every case. When strong reasons for creating a subcategory present themselves, and when the dangers can be minimized or eliminated, the mechanized uttering of "content regulation" need not prevent the embodiment in first amendment doctrine of the plain fact that there are different varieties of speech.

[Schauer, supra, 34 Vand.L.Rev. at 290 (footnote omitted).]

Although the Supreme Court divided five to four on the constitutionality of the St. Paul ordinance (apart from the issue of overbreadth), I find incontestable the superiority of the balancing test advocated by Justice Stevens compared with the categorical and presumptive approach adopted by the R.A.V. majority. To hold the St. Paul ordinance presumptively invalid because it fails to criminalize fighting words addressed to topics other than race, color, creed, religion, or gender ignores not only established First Amendment jurisprudence but also common experience as well.

The R.A.V. majority takes pains to classify the primary vice of the St. Paul ordinance not as "underinclusiveness" but as "content discrimination": "In our view, the First Amendment imposes not [*90] an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2545, 120 L.Ed.2d at 320. But when the R.A.V. majority explains what it means by content discrimination, its explanation underscores that the "discrimination" in content that renders St. Paul's ordinance facially invalid derives solely from St. Paul's failure to have expanded the breadth of the ordinance to criminalize fighting words addressed to other subjects -- in other words, the ordinance is "underinclusive":

Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

[Id. at , 112 S.Ct. at 2547, 120 L.Ed.2d at 323.]

But the R.A.V. Court's conclusion that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects" begs the very question that the Court has resolved differently in a number of cases involving underinclusive regulations of speech: whether a law targeting some but not all speech in a category is invalid as a content-based discrimination or is sustainable by deferring to the legislative judgment concerning which of several causes of a problem government elects to regulate. See William E. Lee, The First Amendment Doctrine of Underbreadth, 71 Wash.U.L.Q. 637, 638 (1993); Stone, supra, 25 Wm. & Mary L.Rev. at 202-07. Characteristically, the Court has invalidated underinclusive regulations under circumstances in which the governmental justification for singling out the

burdened class or favoring the excluded class is considered insufficient. See, e.g., City of Cincinnati v. [*91] Discovery Network, Inc., 507 U.S. , 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (invalidating Cincinnati ordinance intended to promote aesthetics by prohibiting use of newsracks on public property to dispense commercial publications but permitting use of newsracks to dispense newspapers); Florida Star v. B.J.F., 491 U.S. 524, 540, 109 S.Ct. 2603, 2612, 105 L.Ed.2d 443, 459 (1989) (holding unconstitutional under First Amendment imposition of civil damages against newspaper that violated Florida statute by publishing [**368] identity of rape victim, noting that victim's identity had been lawfully obtained and statute was underinclusive in not prohibiting dissemination of victim's identity by means other than publication in any "'instrument of mass communication'" (quoting Fla.Stat. @ 794.03 (1987)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234, 107 S.Ct. 1722, 1730, 95 L.Ed.2d 209, 223 (1987) (invalidating under First Amendment Arkansas sales tax that taxed general-interest magazines but exempted newspapers and religious, professional, trade, and sports journals, noting that Arkansas "advanced no compelling justification for selective content-based taxation of certain magazines"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (invalidating under First Amendment Massachusetts criminal statute prohibiting only banks and business corporations from making expenditures to influence vote on referendum proposals, and finding no compelling state interest sufficient to justify restrictions on corporate speech); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125, 134 (1975) (invalidating on First Amendment grounds ordinance prohibiting drive-in movie theaters with screens visible from public streets from showing films containing nudity; observing that underinclusive classifications may be sustained on theory that government may "deal with one part of * * * problem without addressing all of it," but finding Jacksonville ordinance strikingly underinclusive and lacking any compelling governmental interest sufficient to sustain it); Police Dept. v. Mosley, 408 U.S. 92, 101-02, 92 S.Ct. 2286, 2293-94, 33 L.Ed.2d 212, 220 (1972) (invalidating on equal-protection grounds Chicago ordinance prohibiting all picketing, except [*92] peaceful labor picketing, within 150 feet of school buildings on ground that ordinance impermissibly relies on content-based distinction in defining allowable picketing; observing that governmental interest advanced by City was insufficient to justify content-based discrimination among pickets).

In other settings, however, the Court has not been reluctant to evaluate the governmental interest asserted in justification of allegedly-underinclusive restrictions on speech, and has determined that adequate reasons existed to justify piecemeal regulation. The most recent illustration of that approach is Burson, supra, 504 U.S. , 112 S.Ct. 1846, 119 L.Ed.2d 5, in which the Court upheld against a First Amendment challenge the validity of a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign literature within one-hundred feet of the entrance to a polling place. The Court pointedly rejected the contention that the Tennessee statute was underinclusive for failing to regulate other forms of speech such as charitable and commercial solicitation and exit polling within that radius:

> [T]here is * * * ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.

[Id. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 19-20.]

Other cases sustaining allegedly underinclusive regulation of speech include Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 1401, 108 L.Ed.2d 652, 668 (1990) (upholding against First Amendment challenge Michigan statute prohibiting corporations from using corporate funds for independent expenditures on behalf of or in opposition to candidates for state office, and finding regulation supported by compelling state interest in limiting political influence of accumulated corporate wealth; concerning underinclusiveness challenge, Court determined that Michigan's decision "to exclude unincorporated labor unions from [statute] is therefore justified by the crucial differences between unions and corporations"); United States v. Kokinda, [*93] 497 U.S. 720, 724, 733, 110 S.Ct. 3115, 3118, 3128, 111 L.Ed.2d 571, 579-80, 586 (1990) (upholding against First Amendment challenge postal regulation barring "[s]oliciting alms and contributions, campaigning for election * * *, [**369] commercial soliciting and vending, and displaying or distributing commercial advertising" on Postal Service property; rejecting contention that regulation is underinclusive, Court characterized as "anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissively suppressing other speech"); City Council v. Taxpayers for Vincent, 466 U.S. 789, 811, 104 S.Ct. 2118, 2132, 80 L.Ed.2d 772, 791 (1984) (upholding against First Amendment challenge by candidate for city council municipal ordinance prohibiting posting of signs on public property; concerning underinclusiveness challenge, Court finds that aesthetic interest in eliminating signs on public property not compromised by allowing signs on private property, and observing that citizen's interest in controlling use of own property justifies disparate treatment); Renton v. Playtime Theatres, 475 U.S. 41, 52-53, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 41 (1986) (upholding against First Amendment challenge zoning ordinance prohibiting adult motion-picture theatres from locating within 1,000 feet of residential zone, church, park, or school; rejecting underinclusiveness argument, Court stated: "That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment."); cf. FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 258 n. 11, 107 S.Ct. 616, 628 n. 11, 93 L.Ed.2d 539, 557 n. 11 (1986) (holding section 316 of Federal Election Campaign Act, 2 U.S.C.A. @ 441b, which prohibits corporations from expending treasury funds in connection with elections to public office, unconstitutional as applied to nonprofit corporation formed to promote "pro-life" causes; rejecting underinclusiveness challenge and observing, "That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations.").

[*94] On at least one occasion the Court rejected an underinclusiveness challenge leveled at a statute criminalizing child pornography, a category of speech that the Court classified, as it had fighting words, as outside the realm of constitutionally-protected expression. Ferber, supra, 458 U.S. at 754, 763-64, 102 S.Ct. at 3353, 3358, 73 L.Ed.2d at 1120-21, 1126-27. The statute prohibited the promotion of sexual performances using children under the age of sixteen, and proof that the performances were obscene was not necessary to establish a violation. The New York Court of Appeals had determined that the statute was unconstitutionally underinclusive, in People v. Ferber, 52 N.Y.2d 674, 439 N.Y.S.2d 863, 422 N.E.2d 523 (1981), "because it discriminated against visual portrayals of children engaged in sexual activity by not also

prohibiting the distribution of films of other dangerous activity." Ferber, supra, 458 U.S. at 752, 102 S.Ct. at 3352, 73 L.Ed.2d at 1120. Reversing, the Supreme Court characterized the statute as describing "a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally 'underinclusive' about a statute that singles out this category of material for proscription." Id. at 765, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128. The Court distinguished its holding from Erznoznik, supra, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, in which the Jacksonville ordinance impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in @ 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that. [Ferber, supra, 458 U.S. at 765 n. 18, 102 S.Ct. at 3359 n. 18, 73 L.Ed.2d at 1128 n. 18 (emphasis added).]

Justice Stevens's pointed observation that the R.A.V. majority opinion "wreaks havoc in an area of settled law," 505 U.S. at , 112 S.Ct. at 2566, 120 L.Ed.2d at 345, is better understood in the context of the Court's demonstrated flexibility in resolving claims of underinclusive regulation of expression. In rejecting an underinclusiveness challenge to a restriction of political speech -- a category [*95] of speech acknowledged to be entitled to the [**370] most comprehensive First Amendment protection, see William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv.L.Rev. 1, 11-12 (1965) -- the Court in Burson, supra, readily deferred to the Tennessee legislature's determination that the regulated speech was the only form of expression requiring governmental restriction. 504 U.S. at , 112 S.Ct. at 1855-56, 119 L.Ed.2d at 19-20. And in Ferber, supra, in which child pornography was categorized, analogously to fighting words, as beyond the realm of constitutionally-protected expression, 458 U.S. at 763-64, 102 S.Ct. at 3358, 73 L.Ed.2d at 1126-27, the Court deemed it unnecessary to require any governmental justification for the statute's underinclusiveness. Id. at 765, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128.

Had the R.A.V. majority accorded minimal deference to First Amendment precedent, it would have sustained the St. Paul ordinance (subject to overbreadth problems) by recognizing the obvious governmental interest in criminalizing that subset of fighting words addressed to the designated subjects (race, color, creed, religion, or gender) because bias-motivated threats that tend to incite violence are predominantly addressed to one or more of those subjects. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich.L.Rev. 2320 (1989) (detailing escalation of bias-related crime and urging criminalization of narrow class of racist speech); Hate Crime Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry, ADL Law Report (Anti-Defamation League of B'nai B'rith, New York, N.Y.), Spring/Summer 1988 (summarizing statistical data describing most frequent victims and commonly reported forms of hate crimes and compiling relevant state and federal legislation). By including race, color, and religion among the proscribed topics of bias-motivated speech, St. Paul's governmental determination closely resembled that reached by Congress in enacting the Federal Hate Crime Statistics Act, Pub.L. No. 101-275 (codified at 28 U.S.C.A. @ 534 (note) (1990)), mandating that the Attorney General acquire data over a five-year period [*96] about "crimes that manifest evidence of prejudice

based on race, religion, sexual orientation, or ethnicity * * *." Ibid. That St. Paul elected not to prohibit bias-motivated speech addressed to other topics reflects not a preference for one type of speech over another, but simply a decision by public officials to "address the problems that confront them." Burson, supra, 504 U.S. at , 112 S.Ct. at 1856, 119 L.Ed.2d at 20.

Closely related to the R.A.V. majority's reliance on content discrimination as a ground for invalidating the St. Paul ordinance is its insistence that the ordinance suffers from the additional flaw of discrimination on the basis of viewpoint. R.A.V., supra, 505 U.S. at , 112 S.Ct. at 2547-48, 120 L.Ed.2d at 323. The R.A.V. majority theorizes that the St. Paul ordinance can be construed as choosing sides in a debate between racists and their targets, barring the use of fighting words by racists but allowing the targets of racists to retaliate by using fighting words. See Kagan, supra, 1992 Sup.Ct.Rev. at 70. That highly theoretical characterization of the St. Paul ordinance should be understood simply as another version of underinclusiveness: if the ordinance banned all fighting words, rather than only those addressed to the designated subjects, neither racists nor their targets would be disadvantaged. Two commentators who analyzed the claim of viewpoint discrimination disagreed on whether the St. Paul ordinance could be so classified. Compare Kagan, supra, 1992 Sup.Ct.Rev. at 70-74 (acknowledging that St. Paul ordinance, as applied but not facially, could effect form of viewpoint discrimination but asserting that such ordinances are sustainable if both necessary and narrowly tailored to serve compelling interest) with Sunstein, supra, 60 U.Chi.L.Rev. at 829 (stating, "Viewpoint discrimination is not established by the fact that in some hypotheticals, one side has greater means of expression than another * * * if the restriction on means has legitimate, neutral justifications."). Both Professors Kagan and Sunstein agree, however, that the validity of the St. Paul ordinance -- whether or not it may theoretically constitute viewpoint discrimination -- should be resolved by determining whether the special harm caused by the restricted speech justifies [*97] the governmental [**371] decision to single out that speech for special sanction. Kagan, supra, 1992 Sup.Ct.Rev. at 76; Sunstein, supra, 60 U.Chi.L.Rev. at 825.

The historical significance of the bias-related harm threatened by the speech restricted by St. Paul's ordinance underscores the fundamental imbalance in the majority's First Amendment analysis. By emphasizing those fighting words that St. Paul has determined it need not regulate, and underestimating the danger posed by the regulated expression, the majority "fundamentally miscomprehends the role of 'race, color, creed, religion [and] gender' in contemporary American society." R.A.V., supra, 505 U.S. at n. 9, 112 S.Ct. at 2570 n. 9, 120 L.Ed.2d at 351 n. 9 (Stevens, J., concurring) (alterations in original). The R.A.V. majority also overlooks the historical context that explains governmental determinations to single out as especially pernicious biasmotivated speech that incites violence based on race and color. One can recall an earlier time in which discrimination based on race and color was authorized by law:

Racial discrimination could be found in all parts of the United States. But it was different in the South, and far more virulent, because it had the force of law. State law condemned blacks to a submerged status from cradle to grave, literally. The law segregated hospitals and cemeteries. It confined black children to separate and grossly inferior public schools. Policemen enforced rules that made blacks ride in the back of the bus and excluded them from most hotels and restaurants. And blacks had little or no voice in making the law,

for in much of the South they were denied the right to vote.

Officially enforced segregation was not some minor phenomenon found only in remote corners of the South. In the middle of the twentieth century black Americans could not eat in a restaurant or enter a movie theater in downtown Washington, D.C. Public schools were segregated in seventeen Southern and border states and in the District of Columbia: areas with 40 percent of the country's public school enrollment. Through two world wars black men were conscripted to serve in segregated units of the armed forces: a form of federally sanctioned racism that was only ended by President Harry Truman in 1948.
[Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 15-16 (1991).]

Similarly, religious-based bias and discrimination was common-place during the first half of this century, and incidents of crime [*98] based on religious bigotry have increased significantly in recent years. See 1991 Status Report, supra, at 1.

As society strives to overcome the effects of institutionalized bigotry, the occurrence and resurgence of bias-motivated crime understandably provokes a governmental response. That response is informed not by an impulse to regulate expression discriminatorily based on content or viewpoint, but by a pragmatic desire to respond directly to the most virulent and dangerous formulation of bias-motivated incitements to violence. "While a cross-burning as part of a public rally in a stadium may fairly be described as protected speech, burning the same cross on the front lawn of [a] * * * neighbor has an entirely different character." John P. Stevens, The Freedom of Speech, 102 Yale L.J. 1293, 1310-11 (1993). An interpretation of the First Amendment that prevents government from singling out for regulation those inciteful strains of hate speech that threaten imminent harm will be incomprehensible to public officials and to the citizens whose interests such laws were enacted to protect.

That the Supreme Court's holding in R.A.V. binds us in our disposition of this appeal is indisputable. Whether it persuades us is another question entirely.

STEIN, J., concurs in the result.

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71. U.S. Newswire, March 09, 1998, 14:54 Eastern Time, NATIONAL DESK, HEALTH WRITER, 2075 words, Transcript of White House Press Briefing by Jennings, Kagan, White House Press Office, 202-456-2100, WASHINGTON, March 9

72. Federal News Service, MARCH 9, 1998, MONDAY, WHITE HOUSE BRIEFING, 7510 words, WHITE HOUSE BRIEFING BRIEFERS: CHRISTOPHER JENNINGS, DEPUTY ASSISTANT TO THE PRESIDENT FOR HEALTH POLICY ELENA KAGAN, DEPUTY ASSISTANT TO THE PRESIDENT FOR DOMESTIC POLICY AND MICHAEL MCCURRY, WHITE HOUSE SPOKESMAN THE WHITE HOUSE BRIEFING ROOM, WASHINGTON, DC

73. FDCH Political Transcripts, March 9, 1998, Monday, NEWS BRIEFING, 2159 words, HOLDS NEWS BRIEFING ON HEALTH CARE; FOR DOMESTIC POLICY; WASHINGTON, D.C., ELENA KAGAN, DEPUTY ASSISTANT TO THE PRESIDENT

74. The Buffalo News, March 7, 1998, Saturday, FINAL EDITION, NEWS, Pg. 4A, 593 words, CLINTON TO PUSH CONGRESS TOWARD TOBACCO LEGISLATION, JONATHAN PETERSON and ALISSA J. RUBIN; Los Angeles Times, WASHINGTON

75. Los Angeles Times, March 7, 1998, Saturday, Home Edition, Page 1, 1132 words, CLINTON TO LEAD MARCH ON ANTI-TOBACCO ROAD; LEGISLATION: PRESIDENT WANTS CONGRESS TO ENACT INDUSTRY REFORMS THAT COULD RAISE $65.5 BILLION FOR OTHER PROGRAMS., JONATHAN PETERSON and ALISSA J. RUBIN, TIMES STAFF WRITERS , WASHINGTON

76. Public Papers of the Presidents, March 6, 1998 / March 13, 1998, 34 Weekly Comp. Pres. Doc. 436, 285 words, Checklist of White House Press Releases

77. Newsday (New York, NY), March 3, 1998, Tuesday, ALL EDITIONS, Page A15, 608 words, TOBACCO AD DISPUTE / CLINTON WARNS BAN WOULD FACE LEGAL FIGHT, By Harry Berkowitz. STAFF WRITER

78. The New York Times, February 23, 1998, Monday, Late Edition - Final, Section A; Page 13; Column 1; National Desk , 1368 words, Higher Quota Urged for Immigrant Technology Workers, By ROBERT PEAR , WASHINGTON, Feb. 22

79. The Houston Chronicle, February 18, 1998, Wednesday, 3 STAR EDITION, A;, Pg. 7, 674 words, Two ex-health officials oppose liability limits for tobacco industry, BENNETT ROTH, Houston Chronicle Washington Bureau, WASHINGTON

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80. M2 PRESSWIRE, February 18, 1998, 4917 words, THE WHITE HOUSE Press briefing by General Barry McCaffrey and Elena Kagan

81. THE DALLAS MORNING NEWS, February 14, 1998, Saturday, HOME FINAL EDITION, BUSINESS; Pg. 2F, 587 words, President seeks support for tobacco bill Clinton urging bipartisan approval, Bloomberg News, PHILADELPHIA

82. Wisconsin State Journal, February 14, 1998, Saturday, ALL EDITIONS, Pg. 2A 652 words, RAISE CIGARETTE TAXES, SAVE LIVES, CLINTON SAYS; A STUDY SAYS A TAX INCREASE OF $ 1.10 PER PACK COULD STOP NEARLY 3 MILLION; YOUNG PEOPLE FROM SMOKING., Nancy Mathis Houston Chronicle, PHILADELPHIA

83. U.S. Newswire, February 13, 1998, 16:17 Eastern Time, NATIONAL DESK, 1602 words, Transcript of White House Press Briefing by Gen. Barry McCaffrey and Elena Kagan (Part 3 of 3), White House Press Office, 202-456-2100, WASHINGTON, Feb. 13

84. U.S. Newswire, February 13, 1998, 16:12 Eastern Time, NATIONAL DESK, 1915 words, Transcript of White House Press Briefing by Gen. Barry McCaffrey and Elena Kagan (Part 1 of 3), White House Press Office, 202-456-2100, WASHINGTON, Feb. 13

85. U.S. Newswire, February 13, 1998, 16:15 Eastern Time, NATIONAL DESK, 1691 words, Transcript of White House Press Briefing by Gen. Barry McCaffrey and Elena Kagan (Part 2 of 3), White House Press Office, 202-456-2100, WASHINGTON, Feb. 13

86. Federal News Service, FEBRUARY 13, 1998, FRIDAY, WHITE HOUSE BRIEFING, 1021 words, SPECIAL WHITE HOUSE BRIEFING SUBJECT: TOBACCO BRIEFER: ELENA KAGAN DEPUTY ASSISTANT TO THE PRESIDENT DOMESTIC POLICY COUNCIL ALSO BRIEFING: JOSEPH LOCKHART PHILADELPHIA, PENNSYLVANIA

87. Federal News Service, FEBRUARY 13, 1998, FRIDAY, WHITE HOUSE BRIEFING, 3116 words, SPECIAL WHITE HOUSE BRIEFING WITH DIRECTOR OF THE OFFICE OF NATIONAL DRUG CONTROL POLICY GENERAL BARRY MCCAFFREY PHILADELPHIA MARRIOTT PHILADELPHIA, PENNSYLVANIA

88. Public Papers of the Presidents, February 13, 1998, 34 Weekly Comp. Pres. Doc. 260, 285 words, Checklist of White House Press Releases, The following list contains releases of the Office of the Press Secretary that are neither printed as items nor covered by entries in the Digest of Other White House Announcements.

89. Los Angeles Times, January 30, 1998, Friday, Home Edition, Page 1, 1115 words, CIGARETTE EXECS GET COOL RECEPTION AT HOUSE HEARING; TOBACCO: THEY EXPRESS REGRET, PUSH FOR RATIFICATION OF LANDMARK SETTLEMENT. BUT DEAL'S PROSPECTS HAVE GROWN CLOUDY., MYRON LEVIN and ALISSA J. RUBIN, TIMES STAFF WRITERS , WASHINGTON

90. Los Angeles Times, January 29, 1998, Thursday, Home Edition, Page 5, 1370 words, NATIONAL PERSPECTIVE; LEGISLATION; PROPOSED TOBACCO SETTLEMENT ISN'T SETTING CONGRESS ON FIRE; SOME LAWMAKERS ARE BEGINNING TO GRAVITATE TOWARD A SCALED-BACK ALTERNATIVE TO THE SWEEPING DEAL., ALISSA J. RUBIN, TIMES STAFF WRITER , WASHINGTON

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91. Newsday (New York, NY), January 27, 1998, Tuesday, ALL EDITIONS, Page A39, 630 words, DISCLOSURE OF TARGETING TEENS COULD SMOTHER SMOKING DEAL, Harry Berkowitz. STAFF WRITER

92. M2 PRESSWIRE, November 25, 1997, 1948 words, THE WHITE HOUSE Remarks by the President and First Lady at Adoption Bill signing

93. M2 PRESSWIRE, November 25, 1997, 1948 words, THE WHITE HOUSE Remarks by the President and First Lady at Adoption Bill signing

94. M2 PRESSWIRE, November 21, 1997, 6008 words, THE WHITE HOUSE Press briefing by E Bowles, S Berger, F Raines, G Sperling, J Yellin, and E Kagan

95. U.S. Newswire, November 19, 1997, 15:09 Eastern Time, NATIONAL DESK, 2079 words, Transcript of Clintons Remarks at Adoption Bill Signing, White House Press Office, 202-456-2100, WASHINGTON, Nov. 19

96. FDCH Political Transcripts, November 19, 1997, Wednesday, NEWS EVENT, 1035 words, DELIVERS REMARKS ON ADOPTION; WASHINGTON, D.C., HILLARY CLINTON, FIRST LADY OF THE UNITED STATES

97. U.S. Newswire, November 14, 1997, 15:13 Eastern Time, NATIONAL DESK, 1614 words, Transcript of White House Press Briefing by Berger, Bowles (4 of 4), White House Press Office, 202-456-2100, WASHINGTON, Nov. 14

98. U.S. Newswire, November 14, 1997, 15:13 Eastern Time, NATIONAL DESK, 1392 words, Transcript of White House Press Briefing by Berger, Bowles (3 of 4), White House Press Office, 202-456-2100, WASHINGTON, Nov. 14

99. U.S. Newswire, November 14, 1997, 15:13 Eastern Time, NATIONAL DESK, 1557 words, Transcript of White House Press Briefing by Berger, Bowles (2 of 4), White House Press Office, 202-456-2100, WASHINGTON, Nov. 14

100. U.S. Newswire, November 14, 1997, 15:13 Eastern Time, NATIONAL DESK, 2601 words, Transcript of White House Press Briefing by Berger, Bowles (1 of 4), White House Press Office, 202-456-2100, WASHINGTON, Nov. 14

101. Federal News Service, NOVEMBER 14, 1997, FRIDAY, WHITE HOUSE BRIEFING, 6523 words, STATEMENT BY PRESIDENT CLINTON REGARDING IRAQ STANDOFF FOLLOWED BY BRIEFING BY ERSKINE BOWLES WHITE HOUSE CHIEF OF STAFF THE WHITE HOUSE BRIEFING ROOM WASHINGTON, DC

102. Public Papers of the Presidents, November 14, 1997, 33 Weekly Comp. Pres. Doc. 1813, 235 words, Checklist of White House Press Releases, The following list contains releases of the Office of the Press Secretary that are neither printed as items nor covered by entries in the Digest of Other White House Announcements.

103. FDCH Political Transcripts, November 14, 1997, Friday, NEWS EVENT, 7124 words, WEBWIRE-MAKES ANNOUNCEMENT ON WHITE HOUSE CHIEF OF STAFF ERSKINE BOWLES; WASHINGTON, D.C., WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES

104. AP Online, November 10, 1997; Monday, Washington - general news, 651 words, Clinton Opens Hate Crime Conference, SONYA ROSS, WASHINGTON

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105. The Associated Press, November 10, 1997, Monday, PM cycle, Washington Dateline, 644 words, President convening meeting to consider responses to hate crimes, By SONYA ROSS, Associated Press Writer, WASHINGTON

106. Charleston Daily Mail, November 10, 1997, Monday, News; Pg. P8B, 586 words, Clinton targets hate crimes - President offering steps to curb sharp rise in reported cases

107. M2 PRESSWIRE, November 10, 1997, 2670 words, THE WHITE HOUSE Press briefing by Maria Echaveste and Elena Kagan

108. Xinhua News Agency, NOVEMBER 10, 1997, MONDAY, 228 words, clinton convenes conference on hate crimes, washington, november 10; ITEM NO: 1110250

109. Denver Rocky Mountain News (Denver, CO), November 8, 1997, Saturday, NEWS/NATIONAL/INTERNATIONAL; Ed. F; Pg. 57A, 361 words, Clinton is asked to omit anti gays as hate topic President schedules 1 day conference at White House on Monday, Ann McFeatters; Scripps Howard News Service, WASHINGTON

110. U.S. Newswire, November 07, 1997, 9:44 Eastern Time, NATIONAL DESK, 1695 words, Transcript of White House Press Briefing on Hate Crimes by Echaveste, Kagan (1 of 2), White House Press Office, 202-456-2100, WASHINGTON, Nov. 7

111. U.S. Newswire, November 07, 1997, 9:44 Eastern Time, NATIONAL DESK, 1218 words, Transcript of White House Press Briefing on Hate Crimes by Echaveste, Kagan (2 of 2), White House Press Office, 202-456-2100, WASHINGTON, Nov. 7

112. Federal News Service, NOVEMBER 7, 1997, FRIDAY, WHITE HOUSE BRIEFING, 2677 words, SPECIAL WHITE HOUSE PRESS BRIEFING WITH ASSISTANT TO THE PRESIDENT AND DIRECTOR OF PUBLIC LIAISON MARIA ECHAVESTE AND DEPUTY ASSISTANT TO THE PRESIDENT FOR DOMESTIC POLICY ELENA KAGAN WHITE HOUSE BRIEFING ROOM RE: WHITE HOUSE CONFERENCE ON HATE CRIMES

113. Public Papers of the Presidents, November 7, 1997, 33 Weekly Comp. Pres. Doc. 1752, 402 words, Checklist of White House Press Releases, The following list contains releases of the Office of the Press Secretary that are neither printed as items nor covered by entries in the Digest of Other White House Announcements.

114. FDCH Political Transcripts, November 7, 1997, Friday, NEWS BRIEFING, 2956 words, HOLDS BRIEFING TO DISCUSS THE UPCOMING WHITE HOUSE CONFERENCE ON HATE CRIMES; WASHINGTON, D.C., MARIA ECHAVESTE, WHITE HOUSE DIRECTOR OF PUBLIC LIAISON

115. FDCH Political Transcripts, September 17, 1997, Wednesday, NEWS EVENT, 880 words, DELIVERS REMARKS ON THE TOBACCO SETTLEMENT; WASHINGTON, D.C., ALBERT GORE, VICE PRESIDENT OF THE UNITED STATES

116. The Herald-Sun (Durham, N.C.), August 12, 1997, Tuesday, Front; Pg. A1;, 726 words, Clinton to pitch companies to hire from welfare rolls, JODI ENDA Knight-Ridder

117. THE ARIZONA REPUBLIC, August 11, 1997 Monday, Final Chaser, FRONT; Pg. A5 552 words, CLINTON TO DEBUNK STIGMA OF WELFARE; WILL TRY TO CHANGE IMAGE OF LAZY 'QUEEN', By Jodi Enda, Knight-Ridder Newspapers, WASHINGTON

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118. The National Journal, August 2, 1997, THE ADMINISTRATION; Pg. 1566; Vol. 29, No. 31, 2614 words, Still a Guy's Game, Alexis Simendinger

119. Austin American-Statesman, July 28, 1997, News; Pg. A2, 451 words, Clinton tells states to put welfare to work for poor, JODI ENDA

120. The Bulletin's Frontrunner, July 28, 1997, Monday, WASHINGTON NEWS, 147 words, Clinton To Discuss Welfare Reform With Governors.

121. THE FORT WORTH STAR-TELEGRAM, July 28, 1997, Monday, FINAL AM EDITION, NEWS;, Pg. 1, 669 words, President targets welfare windfalls; Texas, other states urged to direct extra money to programs for poor, JODI ENDA, Knight-Ridder News Service

122. Las Vegas Review-Journal (Las Vegas, NV), July 28, 1997 Monday, FINAL EDITION, A;, Pg. 3A, 495 words, Clinton's LV speech to focus on welfare, Jane Ann Morrison

123. Agence France Presse, July 27, 1997, Domestic, non-Washington, general news item, 374 words, Welfare, children's aid to be debated at US governors' conference, LAS VEGAS, Nevada, July 27

124. M2 PRESSWIRE, June 30, 1997, 5680 words, THE WHITE HOUSE Briefing by Secretary Shalala and Bruce Reed

125. The Washington Post, June 28, 1997, Saturday, Final Edition, A SECTION; Pg. A08, 627 words, Clinton's Feelings Vary On Tobacco Settlement; Administration Review Could Be Delayed, John F. Harris, Washington Post Staff Writer

126. U.S. Newswire, June 27, 1997, 15:58 Eastern Time, NATIONAL DESK, 2890 words, Transcript of Press Briefing by Donna Shalala and Bruce Reed (1/2), White House Press Office, 202-456-2100, WASHINGTON, June 27

127. Federal News Service, JUNE 27, 1997, FRIDAY, WHITE HOUSE BRIEFING, 3660 words, NEWS BRIEFING WITH DONNA SHALALA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND BRUCE REED, ASSISTANT TO THE PRESIDENT, DOMESTIC POLICY COUNCIL SUBJECT: ADMINISTRATION STUDY OF PROPOSED TOBACCO DEAL

128. NBC - Professional, June 27, 1997, Friday, 4022 words

129. FDCH Political Transcripts, June 27, 1997, Friday, NEWS BRIEFING, 4154 words, HOLDS NEWS BRIEFING ON THE INTER-AGENCY REVIEW OF THE PROPOSED TOBACCO SETTLEMENT; WASHINGTON, D.C., DONNA SHALALA, U.S. SECRETARY OF HEALTH AND HUMAN SERVICES

130. Federal News Service, JUNE 12, 1997, THURSDAY, WHITE HOUSE BRIEFING, 7152 words, WHITE HOUSE SPECIAL BRIEFING SUBJECT: PRESIDENT CLINTON'S INITIATIVE ON RACE BRIEFERS: JOE LOCKHART, DEPUTY PRESS SECRETARY SYLVIA MATHEWS, DEPUTY CHIEF OF STAFF AND MARIA ECHAVESTE, DIRECTOR, OFFICE OF PUBLIC LIAISON THE WHITE HOUSE BRIEFING ROOM WASHINGTON, DC

131. NBC - Professional, June 12, 1997, Thursday, 12663 words

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132. The New York Times, June 5, 1997, Thursday, Late Edition - Final, Section A; Page 1; Column 4; National Desk , 1011 words, G.O.P. BACKING OFF A DEAL TO RESTORE AID TO IMMIGRANTS, By ROBERT PEAR , WASHINGTON, June 4

133. Reuters North American Wire, March 8, 1997, Saturday, BC cycle, 576 words Clinton says government will hire some off welfare, By Steve Holland, WASHINGTON

134. Reuters World Service, March 8, 1997, Saturday, BC cycle, 577 words, Clinton says government will hire some off welfare, By Steve Holland, WASHINGTON, March 8

135. The Commercial Appeal (Memphis, TN), March 2, 1997, SUNDAY, FINAL EDITION Pg. A9, 295 words, CLINTON HOPES GOVERNMENT CAN HIRE FROM WELFARE ROLLS, Stephen Barr The Washington Post, WASHINGTON

136. The Washington Post, March 01, 1997, Saturday, Final Edition, A SECTION; Pg. A07, 704 words, Clinton Seeking Ways for Government To Put Welfare Recipients on Payroll, Stephen Barr, Washington Post Staff Writer

137. The National Journal, February 8, 1997, PEOPLE; Pg. 290; Vol. 29, No. 6, 1974 words, Louis Jacobson

138. The National Law Journal, January 20, 1997, WASHINGTON BRIEF; Pg. A9, 264 words, No. 5 Takes His Place On The Hot Seat, HARVEY BERKMAN

139. The Bulletin's Frontrunner, January 15, 1997, Wednesday, WASHINGTON NEWS, 374 words, Personnel: FEC; Jesse Jackson; Park Service; WH Staff.

140. The Washington Post, January 15, 1997, Wednesday, Final Edition, A SECTION; Pg. A17; THE FEDERAL PAGE; IN THE LOOP, 943 words, A Familiar Face for a Fresh Look, Al Kamen, Washington Post Staff Writer

141. Public Papers of the Presidents, January 10, 1997, 33 Weekly Comp. Pres. Doc. 32, 583 words, Digest of Other White House Announcements, The following list includes the President's public schedule and other items of general interest announced by the Office of the Press Secretary and not included elsewhere in this issue.

142. M2 PRESSWIRE, January 8, 1997, 734 words, THE WHITE HOUSE Statement by Press Secretary

143. United Press International, January 8, 1997, Wednesday, BC cycle, Washington News, 260 words, Ruff named White House counsel, WASHINGTON, Jan. 8

144. The Washington Times, January 8, 1997, Wednesday, Final Edition, Part A; NATION; Pg. A4, 748 words, Clinton chooses D.C.'s lawyer; Ruff as general counsel to take on president's problems, Warren P. Strobel; THE WASHINGTON TIMES

145. U.S. Newswire, January 07, 1997, 20:03 Eastern Time, NATIONAL DESK, 1328 words, White House Statement on Personnel Announcements, White House Press Office, 202-456-2100, WASHINGTON, Jan. 7

146. The Associated Press, January 7, 1997, Tuesday, AM cycle, Washington Dateline, 403 words, Source: Clinton settles on new White House counsel, By

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RON FOURNIER, Associated Press Writer, WASHINGTON

147. Reuters North American Wire, January 7, 1997, Tuesday, BC cycle, 348 words, Clinton names Charles Ruff top White House lawyer, WASHINGTON

148. United Press International, January 7, 1997, Tuesday, BC cycle, Washington News, 262 words, Ruff named White House counsel, WASHINGTON, Jan. 7

149. The Bulletin's Frontrunner, January 6, 1997, Monday, WASHINGTON NEWS, 160 words, Ruff Considered For Quinn's White House Post.

150. The Washington Post, January 06, 1997, Monday, Final Edition, A SECTION; Pg. A15; IN THE LOOP; THE FEDERAL PAGE, 955 words, Looks Unlike America, Al Kamen, Washington Post Staff Writer

151. Yale Law Journal, October 1996, Vol. 106, No. 1 Pg. 151-195; ISSN: 0044-0094; CODEN: WOOCDD, 18014 words, Subsidized speech, Post, Robert C, 01326147

152. Congressional Press Releases, May 29, 1996, Wednesday, PRESS RELEASE, 39283 words, MOORE, WILLIAM CLINGER , CONGRESSMAN , HOUSE , PROCEEDINGS AGAINST JOHN M. QUINN, DAVID WATKINS, AND MATTHEW

153. The Washington Post, May 27, 1996, Monday, Final Edition, A SECTION; Pg. A21; THE FEDERAL PAGE; IN THE LOOP, 854 words, When Spy Meets Spy, Al Kamen, Washington Post Staff Writer

154. Fulton County Daily Report, May 20, 1996, Monday, 1640 words, Three-Way Race Shapes Up to Fill DOJ Post; Crucial Election-Year Decisions May Await New Yead of Office of Legal Counsel, CHARLES FINNIE; American Lawyer News Service.

155. Legal Times, May 13, 1996, Pg. 1; 1984 words, At Justice, Contenders Vie For Sensitive Legal Post, BY CHARLES FINNIE

156. Star Tribune (Minneapolis, MN), February 6, 1996, Metro Edition, News; Pg. 13A, 1063 words, Balancing free speech and equal protection of law, Leonard Inskip; Staff Writer

157. The Buffalo News, November 14, 1995, Tuesday, CITY EDITION, EDITORIAL PAGE, Pg. 2B, 183 words, DISSERVICE TO SCHOLARLY WORK ON HATE SPEECH

158. The Associated Press, August 12, 1994, Friday, PM cycle, Washington Dateline, 771 words, Mikva's Political Skills To Be Tested As Clinton's New Counsel, By JAMES ROWLEY, Associated Press Writer, WASHINGTON

159. Chicago Sun-Times, June 13, 1994, MONDAY, Late Sports Final Edition, FINANCIAL; BUSINESS APPOINTMENTS; Pg. 46, 630 words, MOVE13061994

160. Chicago Tribune, January 16, 1994 Sunday, FINAL EDITION, TEMPO; Pg. 1; ZONE: C, 2039 words, IN HIS COURT; MIKVA BRINGS A POLITICIAN'S PERSPECTIVE TO THE FEDERAL BENCH, By Michael Kilian, Tribune Staff Writer., WASHINGTON

161. Off Our Backs, April 1993, Vol. xxiii, No. 4; Pg. 13-5; ISSN: 0030-0071, 00705553, 4512 words, Speech, Equality, and Harm: Feminist Legal Perspectives on Pornography and Hate Propaganda: [Part 2 of 4]

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162. Legal Times, February 25, 1991, Pg. 12, 1324 words, Rap Group's Appeal; Show-Biz Forces Rally for 2 Live Crew, BY JANICE HELLER

163. New York Law Journal, March 15, 1990, Thursday, Pg. 5, 247 words, Corporate Decisions in the Second Circuit, COMPILED BY JACQUELINE M. BUKOWSKI

164. The National Law Journal, October 17, 1988, Pg. 3, 1230 words, 36 New Clerks for the High Court; Almost Half Are From D.C. Circuit, BY MARCIA COYLE, National Law Journal Staff Reporter, Washington

165. The National Law Journal, October 12, 1987 Correction Appended, Pg. 3, 1078 words, 31 New Clerks Begin at Supreme Court; 34 Ex-Clerks Turn in Passes, BY MARCIA COYLE, National Law Journal Staff Reporter

166. Legal Times, September 7, 1987 Correction Appended, Pg. 4, 1632 words, Boutiques Lose Appeal for 1986 Clerks, Reported by Susan Hollinger, LJ Pendlebury, and Lisa Schkolnick

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ELENA KAGAN
Washington, D.C.

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COLLEGE: Princeton University (A.B.)

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The New Republic

MARCH 8, 1999

SECTION: Pg. 16

LENGTH: 1327 words

HEADLINE: THE DAY AFTER

BYLINE: Dana Milbank

HIGHLIGHT:
White House Watch

BODY:

A few hours after the Senate acquitted President Clinton last Friday, Paul Begala celebrated by taking his young sons to the rodeo. The weary presidential counselor had come for some relaxation; instead, he found allegory. The rodeo announcer declared that a fellow named J.W. Hart would be riding that night--for the first time since a nasty spill last year earned him 80 stitches and 30 staples in his head. Good ol' J.W., the announcer said, had to pull out some of the staples that night just to put on his ten-gallon hat. "For me, it was a fitting metaphor," Begala says. "You get sutured up and climb back on. My heart went out to him: there he was, back on that bull."

The White House staff, too, was back on its prescandal bull this week. After a three-day weekend and a presidential jaunt to Mexico, the senior staff meeting Tuesday was almost boring in its efficiency. Counsel Charles Ruff, after months in the spotlight, delivered a one-word report: "Nothing." Press Secretary Joe Lockhart stepped up the push for a first-in-ages Clinton press conference amid signs the president might actually do it. The White House drug office, of all things, delivered the longest report of the morning, and representatives of the bureaucracy's alphabet soup--OMB, CEQ, DPC, NEC, NSC--basked in their sudden return to relevance.

"All these people who had been on page twentyone for the last year are now on page one," says one top Clinton aide. The White House plans a profusion of Social Security and USA Account events, plus new attention for Kosovo, Iraq, and even Ghana. One long-neglected national security adviser remarked excitedly to his colleagues: "Sixty-four foreign policy stories today in The New York Times! It's like the old days!"

As for the scandalmen, it's more like nap time. "I was thinking of having a 'will spin for food' sign made up," says Jim Kennedy, the scandal spokesman. " It's amazing: my pager didn't go off once on Sunday." Kennedy, who, like most staffers, took President's Day off, will spend the next few days cleaning off his desk.

Things are much the same for the White House press corps, which, after a year of wishing away the scandal, seems to have more of a sense of dread than relief. There was an eerie calm in Washington the Day the Scandal Died. Nobody was staking out the Mayflower. Not a camera was posted outside Monica's lawyers' offices. At the White House's Northwest Gate, where Monica threw her

now-infamous jealous fit upon learning from the Secret Service that her man was in the Oval Office with another gal, all was quiet. Inside the briefing room, bored photographers were watching a TV talk show titled "My Daughter Dresses Too Revealing." Out on the lawn, television correspondents were applying makeup, getting ready to tell the world what it already knew: Clinton was off the hook. The only disturbance was a stiff breeze, which disrupted the correspondents' equipment--and hairdos. A few minutes before the vote, a windswept Sam Donaldson stormed into the briefing room, shouting " Jesus Christ!" A woman laughed. "Hold that toupee," she said after he passed.

There were occasional bursts of jubilation as the afternoon progressed, first with the Senate acquittal and then with the Clinton acceptance speech. " He's free! Free Willy!" a gentlelady of the press exclaimed. But despite the professions of relief, reporters quietly confided to each other a different sentiment--boredom. "Who are we going to throw out now?" one asked. "It doesn't feel very historical, does it?" mused another. "Now what are we going to write about?" a reporter for a big daily asked. "That," somebody responded, "is what I'm afraid of."

Me, too. How are we going to fill our pages without the scandal? Are we now to turn to the much-neglected stories of the past year? Will we finally learn the details of the education policies Monica Lewinsky shared with the president? Will we explore the legal precedents in Ken Starr's defense of Meineke Discount Muffler? The boredom has already set in. Even before the vote, the press was trying to make the roll call into a parlor game, predicting the irrelevant matter of whether there would be 50 votes for either charge. By the Monday following the vote, deflated networks were already returning to JonBenet Ramsey. NBC's Jamie Gangel, who snagged the first Linda Tripp interview, was reduced Tuesday to doing a way-too-long segment on the revival of roller derby.

At the moment, the press is entertaining itself by trying to catch Clinton and his aides in flagrante delicto, gloating. Lockhart felt compelled to declare the White House a "gloat-free zone," and the no-gloat policy was so strictly enforced that the press-office staff showed not so much as a grin when Clinton was acquitted. Lockhart's office curtains were drawn Friday to hide whatever gloating happened inside. Photographers with telephoto lenses found an open window on the second floor of the White House, but the gloaters quickly discovered the espionage and drew the shades. After the acquittal vote, a White House janitor walked out with an empty case of Maker's Mark whiskey--tantalizing evidence that somebody must be gloating somewhere inside the mansion.

Moments later, I was almost knocked over by a stampede of photographers chasing Ruff's wheelchair as he made his way through the gate to the Bombay Club for lunch. A reporter later asked Lockhart whether such a conspicuous departure for lunch was smoking-gun evidence of gloating. "If you think walking out through one gate over another is some sort of signal to someone, you're overthinking," Lockhart said. Looking for gloating in all the wrong places and finding none, journalists had to content themselves with fantasies about behind-the-scenes gloating. "They're probably in there trying to stick rags down his throat," one correspondent said of Clinton after the acquittal. When Lockhart's briefing was delayed, another journalist suspected surreptitious gloating. "Joe can't keep himself from smiling," he said. "They have to wait until he stops. It's a gloat-free zone."

Actually, the only gloating I could detect at the White House was gloating about not gloating. Relieved, they said. Content, yes. Liberated, certainly. But gloating? "No," said Lanny Davis, who proceeded to parse the definition of gloating. "I don't mind saying I feel vindicated," the spinner said. "I intend to constantly remind every Republican member of the House who voted for perjury to call Fred Thompson and Richard Shelby," two GOP senators who voted against the perjury article. But, Lanny, isn't that gloating? "That part of it isn't gloating," Davis said. "It's vindication. It's legitimate."

Clintonites have good reason not to gloat. For one, there's no predicting what Starr might try next. "How many days you think will pass after the impeachment trial before Starr files a sixty-three-count indictment against the president?" one Clinton aide asked. "He's on a mission from God." A number of White House aides, burned out by the scandal, are heading for the door now that it's over. Greg Craig and Lanny Breuer will leave the counsel's office; two other members of the scandal team, Adam Goldberg and Don Goldberg, have already left. Elena Kagan, number two at the Domestic Policy Council, is off to Harvard; even Begala is said to be leaving.

Too many White House aides have been saddled with huge legal bills, have been personally devastated, or are just worn out by scandal management. "I feel as if I've been hit by a truck," says Larry Stein, Clinton's top lobbyist. One senior Clinton aide says he's tired of the "doe-eyed" looks of reporters who profess distaste for scandal and delight now that it's over. " I'm sure it's hard to cover a fire," he says, "but don't dare tell me covering a fire is harder than having the expletive house burning down around you."

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